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Supreme Court of the United States

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OCTOBER TERM, 1947

No. 298

In the Matter of
William S. Fenerty

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH
OF PENNSYLVANIA.

✓
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INDEX

Subject Index

	<i>Page</i>
Petition for the Allowance of a Certiorari	
Questions presented	1
History of the case	2
Specifications of error	7
Reasons for granting writ	9
Brief:	
Opinions below	13
Jurisdiction	13
Statement of the case	13
Summary of Argument	13
Argument	15
Appendix A—Act of May 19, 1897 and Amendments	1a
Appendix B—Nature of the Complaint	2a
Appendix C—Circumstances under which Appeal was perfected	4a
Appendix D—Practice Rule #63	4a
Appendix E—Practice Rule #73	5a
Appendix F—Questions submitted to Supreme Court of Penna.	5a
Appendix G—Practice Rule #84	7a
Appendix H—Rule #215 of C. P. Courts of Phila. with history	8a
Appendix J—Verity of the record	14a
Appendix K—Relations between Judge and interest- ed party	16a
Appendix L—Act of June 24, 1939 PL 872 Sect. 324.	19a
Appendix M—Practice Rules #68 and 69	19a

INDEX—Continued

	<i>Page</i>
<i>Citations</i>	
<i>Cases:</i>	
Amaden, In re 44 NE (2nd) 558, 562.....	27
Anderson, In re 19 NE (2nd) 330, 333	25
Auditore's Est. 287 NYS 873, 877 ...	20
Bank vs. Cooper, 36 Me. 179	26
Bobbitt's Est. 131 Pa. Sup. Ct. 386	17
Brickerhoff-Faris Co. vs. Hill, 281 U. S. 673, 682	18
Bridge Co. vs. Bachman, 66 NY 261.....	26
Brummond, In re 44 NE (2nd) 833	27
Carter's Est. 254 Pa. 518, 527	11, 21
Chicago M&StP Ry. Co. vs. Polk, 232 US. 165, 168.....	18
Commonwealth vs. Conroy, 69 Pitts. Legal J. 373	23
Commonwealth vs. Hall, 291 Pa. 341, 355	11, 19, 20
Commonwealth vs. Myers, 19 Pa. Dist. Rep. 1136	23
Commonwealth vs. O'Keefe, 298 Pa. 169	12, 24
Commonwealth vs. Stauch, 256 Pa. 620, 101 A. 72	22
Commonwealth vs. Shawell, 325 Pa. 497, 191 A 17	22
Cooke vs. United States, 267 U. S. 517, 537, 538	12, 24
Core's Est. 113 Pa. Sup. Ct. 388	17
Crawford's Est. 307 Pa. 102, 108	23
Crew-Levick vs. McCafferty, 124 Pa. 200	20
Donaghy, In re 66 NE (2nd) 856, 858	24
Donley vs. Semans, 260 Pa. 88, 92, 93	10, 15, 17
Dziengielewski vs. Dickson City School Dist. 314 Pa. 24..	17
Ebling vs. Schuykill Haven Boro, 244 Pa. 505	21
Elliott, In re 84 Pac. Rep. 750, 752	25
First National Bank vs. Weld, 264 U. S. 450.....	11, 21
Fiske vs. Kansas, 274 U. S. 380, 385	9, 16
Gorham Mfg. Co. vs. State Tax Com. 266 U. S. 265.....	11, 20

INDEX—Continued

	Page
Greason vs. Cumberland R. Co. 54 Pa. Sup. Ct. 595.....	23
Grievance Committee vs. Strickland, 158 SE 110, 112...11, 21	
Henry's Est., 290 Pa. 537	17
Hopt vs. Utah, 110 U. S. 574, 579	11, 20
Hughes vs. Roosevelt, 107 Fed. (2nd) 901, 903.....	16
Indianapolis Rolling Mill vs. St. Louis FW&WR Co. 120 US 256	27
Interstate Commerce Com. vs. Louisville & N Ry. Co. 227 U. S. 88, 91	18
Jordan vs. Eisele, 273 Pa. 95, 98	17
Koch Election Contest, 351 Pa. 544, 548	17
Lasecki, In re, 192 NE 655, 657	28
Layton vs. Comp. Board, 156 Pa. Sup. 225, 227.....	17
Manufacturing Co. vs. McAllister, 36 Mich. 327.....	26
Marion Mfg. Co. vs. Board of Com. 126 S E 114.....	11
Mills vs. Commonwealth, 13 Pa. 627, 629	19, 20
Montgomery Co. Bar vs. Rinalducci, 329 Pa. 296	11
Morgan vs. United States, 298 US 468, 480, 481.....	18
Nixon vs. Nixon, 329 Pa. 256, 259	18
Norwegian Nitrogen Co. vs. United States, 288 US 294, 318, 319	18
Ohio Bell Tel. Co. vs. Com. 301 US 292, 304, 305.....	18
Old Wayne Life Asso. vs. McDonough, 204 US 8.....	19
Onderdonk's Est. 125 Pa. Sup. Ct., 124, 129.....	17
Peck vs. State Bar Asso., 17 Pac. (2nd) 112.....	25
Pennoyer vs. Neff, 95 U. S. 714, 733.....11, 12, 19, 24	
Polokoff vs. Marchand College, 287 Pa. 28.....	17
Raish vs. Orchard, 218 Pac. 655, 656.....	26
Real Est. & Mortgage Co. vs. Duquesne Light Co. 99 Pa. Sup. Ct. 222	17

INDEX—Continued

	Page
Salado College vs. Davis, 47 Tex. 131	26
Saunders vs. Shaw, 244 U. S. 317, 319, 320	9, 16
Schmehl vs. Mellinger, 325 Pa. 487, 489	17
Scott vs. McNeal, 154 U. S. 34	19
Seem's Estate, 341 Pa. 199	17
Serber In Re, 14 Pa. D&C 481	20
Smith In re 5 NE (2nd) 227	28
Snyder vs. Mass, 291 U. S. 97, 105	15
Sterrett vs. McLean 293 Pa. 557, 566	11, 21
Twing vs. New Jersey, 211 U. S. 78, 110.....	11, 19
Union Gold Mining Co. vs. Rocky Mt. National Bank, 96 U. S. 640	27
United States vs. Manton, 107 Fed (2nd) 834.....	20
Van Horn, In Re, 135 Pa. 110, 19 A 853.....	20
Wayne Boro Inc. 12 Pa. Sup. Ct. 363, 370.....	11, 21
West Ohio Gas & Electric Co. vs. Public Utilities Com. 294 US 79	18
Williams vs. Kaiser, 323 US 471, 473, 474.....	16
Williams, In re, 128 SW (2nd) 1098	25
Wolf's Disbarment, 288 Pa. 331	11
Woodward's & Williamsons Ass't, 274 Pa. 567.....	17
Ziegler's Petition, 207 Pa. 131, 137	17

Standard Law Books:

American Juris Prudence, vol. 2, p. 86, sec. 232.....	27
American Juris Prudence, vol. 5, p. 434, sect. 288.....	27
Corpus Juris Secundum, vol. 7, p. 766, sect. 25, sub. div. b. 25	
Corpus Juris Secundum, vol. 21, p. 127, sect. 85.....	20
Ruling Case Law, vol. 7, p. 1027.....	21

INDEX—Continued

Page

Statutes of Pennsylvania:

Act of 19 May 1897, P. L. 67, Sec. 2 and 4.....	3, 15, 1a, 2a
Act of 21 May 1901, PL 287, Sec. 1.....	21
Act of 22 March 1923 PL 30, Sec. 1.....	2a
Act of 12 March 1925 PL 32, Sec. 1.....	2a
Act of 11 May, 1927 PL 972, No. 464, Sec. 1.....	2a
Act of 24 June, 1939 PL 872, Sec. 324.....	19a

Rules of Supreme Court of Pennsylvania:

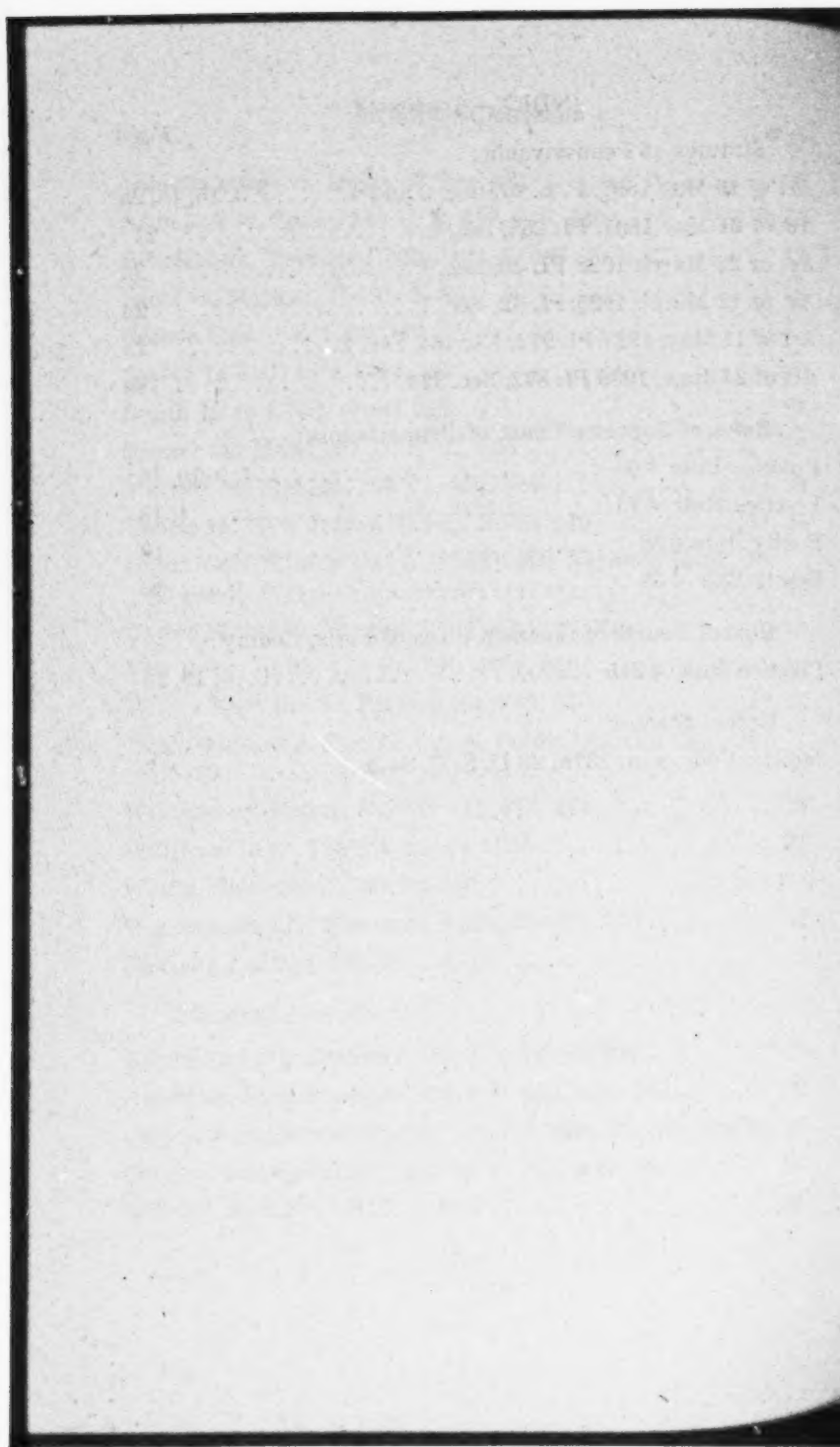
Practice Rule #63	4, 9, 10, 16
Practice Rule #73	4, 18
Equity Rule #68	10
Equity Rule #69	10

Rule of Courts of Common Pleas of Phila. County:

Practice Rule #215	5, 19, 23
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United States:

Judicial Code, sect. 237b 28 U. S. C. 344b.....	/ 3
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

In the Matter of

William S. Fenerty

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH
OF PENNSYLVANIA.**

PETITION

William S. Fenerty prays for the allowance of a Writ of Certiorari to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in the above case on May 7, 1947, quashing an Appeal from the judgment of the Court of Common Pleas No. 6 of Philadelphia County.

QUESTIONS PRESENTED

I. Where a Statute makes no provision as to when an appeal must be perfected in the lower court and the appellate court has ruled it must be done within a reasonable time: Does it violate a substantive federal right to quash the appeal without a hearing as to the reasonableness of the time consumed in perfecting the appeal?

II. Where a court rule provides that an appeal prop-

erly taken may be quashed upon "motion of appellee" to which appellant may "reply within five days", and, after both parties waived oral agreement, the appeal was submitted on briefs without a motion by appellee or question by the court: Does it violate a substantive federal right when the court subsequently quashes the appeal, sua sponte, upon an alleged jurisdictional objection not apparent of record?

III. Where a Court Rule states that three judges, selected as therein provided, "will sit at a hearing" of a disbarment proceeding: Does it violate a substantive federal right for three judges to enter a decree under this Rule when two of them heard only some witnesses; the third judge was absent; and a hearing upon exceptions was denied?

IV. Where a Statute makes it unlawful to "dissuade, hinder or prevent any witness from attending and testifying" and a court rule provides that "such evidence as either party desires to present shall be heard": Does it violate a substantive federal right when one of the parties, with the knowledge of the court, induces witnesses to ignore a subpoena?

V. Should the court consider the complaint of a witness who was in full possession of all the facts and remained silent until, after thirteen years, the competent witnesses are dead and the revelant correspondence destroyed, especially when it is the duty of the witness to speak at the time, and the court records discredit his testimony?

HISTORY OF THE CASE

The Petitioner prays for a Writ of Certiorari to review the final judgment of the

Supreme Court of Pennsylvania sustaining the validity of a Statute of Pennsylvania and Rules of its courts against the claim that, as construed and applied to the Petitioner, they violate the Fourteenth Amendment to the Federal Constitution.

The Statute in question is the Act of May 19, 1897, P. L. 67, sects. 2 and 4 and the amendments thereto: P. S. Title Courts vol. 12 p. 101.¹ Section 4 of the Act provides that an Appeal, which is not a supersedeas, "must be taken within three calendar months from the entry of final judgment"; and Section 2 of the Act provides that "no Appeal shall be considered *perfected* until such writ be filed in the court below. . . ."

The Petitioner, a resident of Philadelphia, Pennsylvania, is an attorney who was disbarred by reason of a decree entered in the Courts of Common Pleas of Philadelphia County on March 30, 1946. (1a)² In reliance upon the terms of the Statute an appeal was taken to the Supreme Court of Pennsylvania on June 1, 1946. (R. 400) It was not a supersedeas and did not involve a question of original jurisdiction. All the statutory requirements with respect to *taking* the appeal were satisfied.

The return day mentioned in the writ is the 4th Monday of November, 1946. (R. 400) By stipulation of counsel, approved by the Supreme Court on October 21, 1946, the original return day was extended until the 1st Monday of January, 1947. (R. 400) * On October 22, 1946 the lower court issued a Nunc Pro Tunc, with consent of both parties, under which the appeal was perfected in the lower court as of August 6, 1946. (R. 399) ³

¹ For the context of the Act see Appendix A.

² The nature of the Complaint and the issues involved will be found in Appendix B.

³ The circumstances under which the appeal was perfected in the lower court will be found in the Record at pages 444-448 and in Appendix C.

* On December 30, 1946 by Stipulation of both parties and with the approval of the Supreme Court the return day of the writ was again extended until the 2nd Monday of April, 1947.

II. Sect. 4 of the Act also provides that "Appeals taken *after* the time herein provided for shall be quashed upon motion." This statutory provision is supplemented by a court practice Rule which provides that an appeal may be quashed for other defects "upon motion of the appellee prior to filing and service of his brief" . . . to which motion the appellant "may reply within five days." ⁴ Another practice Rule of the court provides that "any case . . . may, by agreement of counsel, be submitted without argument" by "counsel stating the question to be decided, and how it arose, if requested to do so by the presiding judge." ⁵

By agreement of counsel, this appeal was submitted upon briefs without oral argument on April 18, 1947. (R. 400) No motion, or any objection of a like nature, was made by the appellee and no questions were asked by the presiding judge as provided by the court rule. Nevertheless, without any preliminary notice, the appeal was quashed by the Supreme Court on May 7, 1947. (R. 400)

It is alleged, by the Supreme Court, that "The three months period (for *taking* the appeal) ended June 30th; the writ of Certiorari was not filed (in the lower court) until nearly four months after that; it was too late." (R. 443)

This action by the Appellate Court involved a question of fact which is not even suggested by the terms of the statute ⁶ or in the briefs submitted for adjudication.⁷

The appellant applied for a rehearing as provided by Practice Rule of the court.⁸ The facts were then presented

⁴ Practice Rule #63, Appendix D.

⁵ Practice Rule #73, Appendix E.

⁶ The Statute makes no restriction as to the time within which the Appeal shall be *perfected* in the lower court outside that implied in the return day of the Writ.

⁷ Appellant's statement and Appellee's counter-statement of the questions submitted for adjudication will be found in Appendix F.

⁸ Practice Rule #84, Appendix G.

to the Appellate Court for the first time. They were not denied by the appellee, upon whom a copy of the Petition was served." A rehearing was refused on May 26, 1927 without any explanation by the Appellate Court other than that mentioned in the Opinion.

III. Questions 1, 2 and 3, submitted to the Appellate Court for adjudication, involved the jurisdiction of the lower court to enter a decree and the denial of a hearing in violation of a substantive Federal Right. (Appendix "F".)

The Bar Committee presented to the lower court a "Petition for Rule to Show Cause why (appellant) should not be disciplined under Rule 215 of the Courts of Common Pleas." (R. 1) An examination of the context of Rule 215 discloses that three judges, selected as therein provided, "will sit at the hearing" of a disbarment proceeding; that "the respondent . . . may summon such witnesses on his behalf, as he desires", and "After a full hearing by the court, at which such evidence as either party may desire to present shall be heard" the court will take such action as is deemed to be expedient.⁹

The docket entries of the lower court recite that two separate hearings were held before the three judges. (R 1a) The record of the testimony makes the same recital. (R. 33a, 49a, 67a) The court stenographer certified that his record is correct. (R. 379a) The stenographer's certificate was approved by one of the judges. (R. 397a) And, in the decree it is recited, *inter alia*, by the three judges that (R. 306a) "testimony was taken before us." To all appearances the court had complied with the terms of Rule #215.

The verity of the record, upon which the court based its decree, was made an issue.¹⁰ Whereupon the court

⁹ Service noted in affidavit filed with Supreme Court May 28, 1947.

¹⁰ For the context of Rule 215 see Appendix H.

¹¹ For particulars see appendix J.

stenographer made an addition to the notes of testimony. (R. 397a) The addition implies that one of the judges instructed the stenographer to "let it appear" that the third judge was present. Subsequently, the three judges signed a statement that the President Judge was not present in the court room when some of the witnesses, including the complainants, were called to testify. (R. 398a)

IV. Question #4 presented to the appellate court involved the neglect of the lower court to compel the attendance of witnesses who had been properly summoned by the appellant to appear. (R. 290) The chancellor of the Bar Association was the private counsel for the complainant. Prior to the submission of the complaint to the Bar Committee, the chancellor issued a statement to the press with respect to the merits of the complaint. (R. 205) He subsequently prepared the complaint, involving an issue upon which certain witnesses were summoned by the appellant to testify. Immediately after service of the summons these witnesses were approached by the complainant and his attorney. (R. 290) By means of the newspaper article the witnesses were persuaded to ignore the summons of the court in violation of the provisions of a Statute which makes it unlawful to "dissuade, hinder or prevent any witness from attending and testifying."¹²

An affidavit, reciting the facts and requesting an attachment, was presented to the Bar Committee. (R. 290-297) Later, the facts were presented to the court before which the same witnesses refused to appear. (R. 33) No attachment was issued either by the committee or by the court.

V. Questions #7 and #8, presented for adjudication to the Supreme Court of Pennsylvania, involved the hearsay testimony of a witness with respect to a transaction which occurred in 1932. The complaining witness stated that he knew all the facts at that time. (R. 70a) It was his duty to speak but he did not do so because there was "no reason"

¹² The context of the Act will be found in Appendix L.

for complaint. (R. 71) The competent witnesses to the transaction are dead and the correspondence has been destroyed. The question involved is whether, under these circumstances, the petitioner was deprived of a reasonable opportunity to present a defense.

SPECIFICATIONS OF ERROR

1. It was error for the Supreme Court of Pennsylvania to quash the appeal, properly taken, under the terms of the Statute, which made no limitation as to when the appeal should be perfected in the lower court.

2. It was error for the Supreme Court of Pennsylvania to affirm and hold (R. 43): "The decree in this case was not opened or set aside for further proceedings; time was running. The three months period ended June 30th; the writ of certiorari was not filed until nearly four months after that; it was too late."

3. It was error for the Supreme Court of Pennsylvania to quash the appeal, upon the unwarranted assumption that it was not perfected in the lower court within a reasonable time, without evidence or inquiry to sustain this finding of fact.

4. It was error for the Supreme Court of Pennsylvania to deprive the appellant of a hearing upon a motion to quash, as provided by its Rule #63. (Appendix D)

5. It was error for the Supreme Court of Pennsylvania to refuse to pass upon the issue as to whether the lower court had jurisdiction to enter a decree under its Rule 215 (Appendix H) when it is admitted that two of the judges heard only some of the witnesses; the third judge was absent; and, a hearing upon exceptions denied.

6. It was error for the Supreme Court of Pennsylvania to affirm and hold (R. 439): "We attach no importance to

appellant's complaint that during the time witnesses were testifying at the hearing in court President Judge McDevitt was actually engaged in another court room."

7. It was error for the Supreme Court of Pennsylvania to affirm and hold (R. 439): "The defendant had agreed that the President Judge should read the evidence of the witnesses and participate in the decision just as all the judges had to read the testimony taken by the Bar Association."

8. It was error for the Supreme Court of Pennsylvania to insinuate that its Rulings in *Montgomery County Bar Ass'n v. Rinalducci*, 329 Pa. 296, 301, 197 A. 924 and *Wolfe's Disbarment*, 288 Pa. 331, 333, 135A. 732, have any application to the question presented in the instant case.

9. It was error for the Supreme Court of Pennsylvania to affirm and hold (R. 440): "If the matter were properly before us for review we should be required to affirm the order."

10. It was error for the Supreme Court of Pennsylvania to refuse to pass upon the issue as to whether the appellant was deprived of a reasonable opportunity to present a defense by the conduct of the complainant and his attorney who, with the knowledge of the court and in violation of a Statute, dissuaded, hindered and prevented properly summoned witnesses from attending the hearing under the court rule which provides that "such evidence as either party desires to present shall be heard."

11. It was error for the Supreme Court of Pennsylvania to refuse to pass upon the issue as to whether the lower court should be permitted to consider the complaint of a witness who was in full possession of all the facts and remained silent until, after thirteen years, the competent

witnesses are dead and the relevant correspondence destroyed, especially when it was the duty of the witness to speak at the time and the court records discredit his testimony.

12. It was error for the Supreme Court of Pennsylvania to permit the lower court to enter a decree of disbarment upon the record in the instant case.

REASONS FOR GRANTING WRIT

The Supreme Court of Pennsylvania has based its adjudication upon a proposition of fact in that it held the appeal, properly taken in reliance upon the terms of a State Statute, had not been perfected within a reasonable time. (R. 436)

The question was first raised in the opinion of the Supreme Court and was in the nature of a surprise move in that the question was not mentioned in the briefs and record submitted for adjudication. There was no motion to quash as provided by Court Rule #63 (Appendix D); and, no questions were asked by the court as provided by Rule #74 (Appendix E).

In cases of this nature it has been held:

SAUNDERS vs. SHAW, 244 U. S. 317, 320.

that it is a violation of due process for a State court to enter a judgment upon a proposition of fact concerning which the petitioner had no occasion or proper opportunity to produce evidence.

Likewise, it has been said:

FISKE vs. KANSAS, 274 U. S. 380, 385.

that it is a violation of due process for a State Court to enter a judgment upon a proposition of fact shown by the record to be without evidence to support it.

The issue was brought to the attention of the appel-

late court in a petition for a rehearing filed nine days after the appeal was quashed. (R. 400) A copy of this petition was served upon appellee and the facts were not denied. (R. 462)

These facts disclose that the petitioner did everything humanly possible to expedite the appeal. The petitioner was harassed by the lower court, which refused to account for relevant documentary evidence which had been removed from the record. The court had arbitrarily entered a final decree, without giving the petitioner an opportunity to note Exceptions, in violation of the Court Rules #68 and 69 (Appendix M). Likewise the court took six months to pass upon Requests for Exceptions, which were originally presented nine days after the decree had been entered. These Requests were subsequently renewed three times before action was taken by the lower court, as is more specifically recited in Appendix C.

In construing the Statute, in reliance upon which the appeal was taken, the State Supreme Court has said:

DONLEY vs. SEMANS, 260 Pa. 88, 92, 93.

"The Legislature . . . did not require the appeal to be *perfected* within six (three) months but merely provided it should be taken or entered within that period, leaving the time for perfecting indefinite. . . . No exact limit of time can be fixed but counsel will be required to be prompt and no more than *reasonable time* for diligent action will be allowed."

What is a reasonable time is a question of fact which must depend upon the particular circumstances of each case. Court Rule #63 (Appendix D) provides the means whereby the appellate court should have determined the facts. The Rule recites that for post appeal defects the appellee "may move" to quash and "a copy of the motion, and papers attached thereto, shall be filed in this court and served on the opposite party who may reply within five days after service thereof". The instant case is the only one wherein

the State Supreme Court has departed from the practice established under the Rule.

There is no non-Federal ground adequate to support the judgment of the State Supreme Court, or of the lower court, in the instant case because it has been said:

PENNOYER vs. NEFF, 95 U. S. 714, 743.

TWING vs. NEW JERSEY, 211 U. S. 78, 110.

due process requires that the court, which assumes to determine the rights of parties, shall have jurisdiction.

The Petition in the instant case was presented by the Bar Committee to the lower court under Rule 215. (R. 1a) The context of the Rule will be found in Appendix H.

In

HOPT vs. UTAH, 110 U. S. 574, 579

it was held that the court is without power to dispense with the Rule. The courts everywhere are in accord that, if a valid statutory method has been established, such method so provided is exclusive and must be resorted to and in the manner specified therein: **GRIEVANCE COM. vs. STRICKLAND, 158 S. E. 110, 112; CARTER'S EST., 254 Pa. 518; STERRETT vs. McLEAN, 293 Pa. 557, 566; WAYNE BORO INC., 12 Pa. Sup. Ct. 363, 370; COM. vs. HALL, 291 Pa. 373; MARION MFG. CO. vs. BOARD OF COM., 147 S. E. 284; FIRST NATL. BANK vs. WELD, 264 U. S. 430; and, GORHAM MFG. CO. vs. STATE TAX COM., 266 U. S. 265.**

The question as to the number of judges required to "sit at the hearing" in the lower court was presented for the first time. The appellate court has not adjudicated the issue. (R. 436) **Wolf's Disbarment, 228 Pa. 331 (1924)** was conducted under an old Rule #223, which has long since been superseded by the present Rule #215. (See Appendix H, Historical Note) **Montgomery County Bar Ass'n vs. Rinalducci, 329 Pa. 296**, was presented to the Courts of Montgomery County under its rule #2, sect. 5, sub. div. A. Neither of these adjudications have any appli-

cation to the question involved in the instant case.

In

COOKE vs. U. S., 267 U. S. 517

PENNOYER vs. NEFF, 95 U. S. 714, 715

COM. vs. O'KEEFE, 298 Pa. 169

it was held that a party must be given reasonable opportunity to present his defense.

The same reasoning applies to the other questions which were presented to the State Supreme Court for adjudication. (Appendix F) The general and local laws sustain the position of the Petitioner. The errors relate not merely to formal or technical matters but to substantial rights of the parties, and they are embodied in the opinion of the State Supreme Court and the lower court. It is, therefore, respectfully submitted that this Petition for allowance of a Writ be granted.

Attorneys for Petitioner.

August , 1947.

BRIEF IN SUPPORT OF PETITION

Opinion of the Court below.

The Opinion of the Common Pleas Court of Philadelphia will be found in the record at p. 304a.

The Opinion of the Supreme Court of Pennsylvania is recorded in 356 Pa. 614. It appears at R. 438-443.

JURISDICTION

The date of the judgment to be reviewed is May 7, 1947. (R. 400) A petition for a rehearing was filed on May 16th, 1947. (R. 400) It was denied May 26, 1947. (R. 400)

The statutory provision under which jurisdiction is invoked is Judicial Code, Sect. 237b, 28 U. S. C. 344b.

STATEMENT OF THE CASE

A full statement of the case, together with the specification of errors, will be found in the petition.

Summary of Argument

I. The Statute required that an appeal must be taken within three months from final judgment. This provision was satisfied in that the appeal was taken within two months. It is not required by the Act that the appeal be perfected in the lower court within any specific time but the Supreme Court has interpreted the Act to mean that it must be done within a "reasonable time". What is a reasonable time is a question of fact.

There is no evidence in the record as to the circumstances under which the appeal was perfected in the lower court. The issue is not embodied in the questions submitted for adjudication and there was no occasion to submit evidence upon the issue until it was raised in the Opinion of the appellate court. It was embodied in a petition for a rehearing which was denied.

II. The appellate court ignored its own rule which provides that questions of this nature may be adjudicated upon motion by appellee and answer thereto by appellant. The court has adhered to this practice in all other cases. But, in this particular case, a new principle was announced as a result of which the appeal was quashed without permitting the appellant to present the facts, which would have tolled the statute or excused the alleged laches, or accomplished both of these things.

III. A Federal constitutional question, involving the jurisdiction of the lower court, was presented to the appellate court which refused to adjudicate the issue. Under a lower court rule three judges selected as therein provided were required to sit at the hearing in these proceedings. Two of the judges heard only some of the witnesses and the third judge was absent. One of the judges who was present instructed the court stenographer to "make it appear" that the third judge was present. He then denied a petition for hearing upon exceptions to this procedure.

IV. Witnesses properly summoned to testify, under the court rule, were persuaded to ignore the summons by the complainant and his attorney in violation of the provisions of a State Statute. An affidavit was filed requesting an attachment but the court said that the question was "not controlling" and no attachment was issued.

V. A complaint was presented by a witness who had possession of all the facts and remained silent until, after thirteen years, the competent witnesses were dead and the relevant correspondence destroyed. It was his duty to speak when the transaction occurred. His testimony is discredited by the court records. Nevertheless, the lower court sustained the complaint. This deprived the appellant of a fair opportunity to present a defense.

ARGUMENT

- I. It is a violation of a substantive Federal right to quash the appeal without a hearing upon the reasonableness of the time consumed in perfecting the appeal in the lower court.

A State is free to regulate the procedure of its courts, unless in so doing it violates a fundamental right: *Snyder vs. Mass.*, 291 U. S. 97, 105. In the instant case, the maladministration of an Act of Assembly, and a Rule of Court with respect thereto, involved a substantive Federal right as distinguished from a mere question of procedure.

An appeal was taken to the Supreme Court of Pennsylvania in reliance upon the Act of May 19, 1897 P. L. Sec. 2 and 4 and the amendments thereto. (Appendix B) In construing this Act the State Court has said: "The Legislature . . . did not require the appeal to be *perfected* within six (three) months but merely provided it should be taken or entered within that period, leaving the time for perfecting indefinite. . . . No exact limit of time can be fixed but counsel will be required to be prompt and no more than *reasonable time* for diligent action will be allowed.": *Donley vs. Semans*, 260 Pa. 88, 92, 93.

Whether the time consumed in perfecting the appeal in the instant case was reasonable or otherwise is a question of fact. Upon this question the appellant was entitled to a hearing. The question was first raised in the Opinion of the appellate court. A petition for a rehearing was denied.

The finding of the appellate court was without evidence to support it because the circumstances, under which the appeal was perfected in the lower court, as recited in Appendix C, were not even suggested in the briefs and record submitted for adjudication. The questions which were presented have been certified and are presented with this petition. (Appendix F)

The court has made an unwarranted assumption of fact. It is a violation of due process for a State Court to enter a judgment upon a proposition of fact concerning which the appellant had no occasion or proper opportunity to introduce evidence: *Saunders vs. Shaw*, 244 U. S. 317, 319, 320. The Federal court will review the findings of fact by a State Court where a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or, where a conclusion of law as to a Federal Right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts: *Fiske vs. Kansas*, 274 U. S. 380, 385.

- II. It is a violation of a substantive Federal right for the court, *sua sponte*, to quash the appeal without a motion by ^{appellant}~~appellant~~, upon an alleged jurisdictional objection not apparent of record.

Practice Rule #63 (Appendix D) provides the means whereby the appellate court should have ascertained the facts before it quashed the appeal. The Rule of Court requires that a motion to quash be presented to the court by the appellee prior to the submission of the appellee's brief. To this motion the appellant may reply within five days.

The appellate court by-passed its Rule #63 and thereby deprived the appellant of an opportunity to present the facts mentioned in Appendix C. It should be noted that the instant case is the only case where this has been done.

The error is a substantial one because, on a motion and reply thereto, the appellant might have been able to furnish facts that would have tolled the statute or excused the alleged laches, or accomplished both of these things. *Hughes vs. Roosevelt*, 107 Fed (2nd) 901, 903; *Williams vs. Kaiser*, 323 U. S. 471, 473, 474. There is ample evidence that the alleged delay in perfecting the appeal was

due to the delinquency of the lower court, both before and after the appeal was taken, as it more particularly recited in Appendix C. None of the facts therein alleged have been denied. The time for taking and perfecting an appeal may be extended by the laxity or fraud of the court or its officials: Ziegler's Petition, 207 Pa. 131, 137; Koch Election Contest, 351 Pa. 544, 548; Layton vs. Comp. Board, 156 Pa. Sup. Ct. 225, 227.

Heretofore there have been no exceptions to the Rule whereby appeals are quashed for ex post facto defects only after motion by appellee under Rule 63. The practice is illustrated by the following cases decided by the State Supreme Court: Jordan vs. Eisele, 273 Pa. 95, 98; Seem's Estate, 341 Pa. 199; Schmehl vs. Mellinger, 325 Pa. 487, 489; Henry's Estate, 290 Pa. 537; Polokoff vs. Marchand College, 287 Pa. 28; and Donley vs. Semans, 260 Pa. 88.

The Superior Court has adhered to the same practice: Onderdonk's Estate, 125 Pa. Sup. Ct. 124, 129; Bobbitt's Est., 131 Pa. Sup. Ct. 386; Core's Est., 113 Pa. Sup. Ct. 388; and, Real Estate & Mortgage Co. vs. Duquesne Light and Power Co., 99 Pa. Sup. Ct. 222.*

Most of these cases are mentioned in the opinion of the State Court in the instant case. In Schmehl vs. Mellinger, supra, it was said: "Ordinarily, the technical quashing of an appeal is to be deprecated." The appellate court, in other cases, has indicated that "the legislative

* The motion to quash, in all these cases, is noted in the opinion of the court. As to Dziengielewski vs. Dickson City School Dist., 314 Pa. 24, 170 A. 268, and Woodward's & Williamson's Assessment, 274 Pa. 567, the motion to quash is not mentioned in the opinion of the court. However, an examination of the records of the court and the briefs submitted discloses that, when the cases were presented to the court for adjudication, the motion to quash was included in the briefs.

In Polakoff vs. Marchand College, supra, and Schmehl vs. Mellinger, supra, the question involved was one of original jurisdiction. The Act required that appeals of this nature must be "taken and perfected" within fifteen days. The reason assigned for quashing the appeal in those cases is not applicable to the instant case.

purpose is not to foreclose a party who satisfactorily explains his delay." : *Nixon vs. Nixon*, 329 Pa. 256, 259. Nowhere in the opinion, in the instant case, is there a word of explanation as to why the court has made a special exception and disregarded its established practice in quashing the appeal. Nor, does the opinion explain why the court by-passed its practice Rule #73 which provides that when the briefs and record are submitted for adjudication, without oral argument, the parties may furnish additional information "if requested to do so" (Appendix E). No such request was made. As a result the appellant was again deprived of an opportunity to state the facts.

By quashing this appeal, without motion or preliminary notice, the Supreme Court of Pennsylvania has violated the Rule that "the inexorable safeguard . . . of a fair and open hearing be maintained in its integrity": *Morgan vs. U. S.*, 298 U. S. 468, 480, 481; *Interstate Commerce Com. vs. Louisville and N. R. Co.*, 227 U. S. 88, 91. The right to such a hearing is one of "the rudiments of fair play" (*Chicago M&StP. Ry. Co. vs. Polk*, 232 U. S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement." : *West Ohio Gas Co. vs. Public Utilities Com.* 294 U. S. 79; *Brinkerhoff-Faris Co. vs. Hill*, 281, U. S. 673, 682. Cf *Norwegian Nitrogen Co. vs. U. S.*, 288 U. S. 294, 318, 319. There can be no compromise on the footing of convenience or expediency, because of a natural desire to be rid of embarrassing questions when that minimal requirement has been neglected or ignored: *Ohio Bell Tel. Co. vs. Com.*, 301 U. S. 292, 304, 305.

III. It is a violation of a substantive Federal right for three judges to enter a decree under the rule when two of them heard only some witnesses; the third judge was absent; and a hearing upon exceptions was denied.

It is a universal principle, as old as the law, that the proceedings of a court, without jurisdiction of the subject

matter, are a nullity and without effect either on the person or the property: *Com. vs. Hall*, 291 Pa. 341, 355; *Mills vs. Com.*, 13 Pa. 627, 629. Due process requires that the court, which assumes to determine the right of parties, shall have jurisdiction: *Pennoyer vs. Neff*, 95 U. S. 714, 733; *Scott vs. McNeal*, 154 U. S. 34; *Old Wayne Life Asso. vs. McDonough*, 204 U. S. 8; *Twing vs. New Jersey*, 211 U. S. 78, 110. In the instant case, the State Supreme Court has said (R 439): "We attach no importance" to the question of the jurisdiction of the lower court to enter the decree.

The Rule, adopted under a statutory provision, is #215 of the courts of Common Pleas of Philadelphia County. (Appendix H) Under this Rule the Bar Committee presented a complaint. (R. 5a) The context of the Rule discloses that three judges, selected as therein provided, "will sit at the hearing" of the complaint. The history of Rule 215 discloses that, prior to June 11, 1933, no provision was made as to the number of judges required to be present at the hearing of a complaint. (Historical Note to Appendix H) In 1933 the Board of Judges consciously inserted into the Rule a provision that "the President Judge . . . shall . . . request a judge from each of the said five Common Pleas Courts to sit with him and determine the matter." Under an amendment of March 5, 1942 "The court to which any petition . . . may be assigned . . . will designate one of its judges to preside at the hearing, and will . . . request each of the two numerically succeeding courts to designate a judge to sit with the judge first designated at the hearing of such Rule." It should be noted that the term "hearing" as used in the Rule is qualified by the adjective "full". There is only one inference that can be drawn from the terms *shall*, *will* and *full*. Likewise, the use of the terms *one* and *two* means that it is mandatory that three judges "sit at the hearing" of all the witnesses and the court may not, with impunity, disregard this provision.

The lower court disregarded the Rule because it is an

admitted fact that two of the judges heard only some of the witnesses; and, that a third judge, who joined in the decree, did not see or hear any of the witnesses. (Appendix J) It is also admitted that one of the judges instructed the court stenographer to "make it appear" that all three judges were present. This statement of the judge is included in addition to the record made by the court stenographer. (R. 387a) This instruction to the stenographer constituted an alteration of the record intended to circumvent the operation of Rule 215: *Crew-Levick vs. McCafferty*, 124 Pa. 200. The lower court has said that an attorney may be disbarred for this practice: In *Re David Serber*, 14 Pa. D & C 481; and the appellate court has also said that an attorney who intentionally alters the record may be disbarred: In *re Van Horn*, 135 Pa. 110, 19 A 853. The question herein involved relates to an *alteration* as distinguished from an *amendment* to the record; and the effect of the alteration was to deprive the appellant of his right to question the jurisdiction of the Court. It is an obstruction of justice and a violation of the oath of office closely akin to that condemned in the case of *United States vs. Manton*, 107 Federal Rep. (2nd) 834.

In extenuation of this offense it is alleged that the appellant acquiesced in the misrepresentation with respect to the witnesses. (R. 398) An examination of the alleged agreement discloses that it makes reference only to witnesses who appeared before the Bar Committee. (R. 35, 36)

It is not within the power of the court to dispense with the Rule. *Hopt vs. Utah*, 110 U. S. 574, 579. Jurisdiction cannot be conferred by agreement, voluntary or otherwise: 21 CJ (2nd) 127 sect. 85; *Com. vs. Hall* 291 Pa. 341-355; *Mills vs. Com* 13 Pa, 627, 629. Estoppel is the most unsatisfactory and frequently hazardous basis of adjudication which should be attained only as a final resort for promoting the ends of justice: In *re Auditore's Est.* 287 NY Supp. 873, 877. Rules, adopted by a court with-

out exceeding the limits of its authority, are often spoken of as having the effect of Rules enacted by the Legislature, or a particular law, and, therefore, as being obligatory on the Court and on the parties: 7 R. C. L. 1027. And, under an Act of Assembly (1901, May 21, P. L. 287, sect. 1) it is directed that "the Board of Judges shall adopt Rules "which shall be binding upon all of (the courts)". Where authority is given by a Legislative Act in a particular case the court will not deviate from the letter thereof: Wayne Boro Inc. 12 Pa. Sup. Ct. 363, 370.

The general rule is that the number of judges, required to be present, must be determined by the Constitutional and Statutory provisions creating and regulating the court. Whether an Act is to be performed by the court, or a judge or judges thereof, is generally determined by the character of the Act. The courts everywhere are in accord that, if a valid statutory method of determining a question has been established, such method so provided is exclusive and must be resorted to and in the manner specified therein: Grievance Com. vs. Strickland, 158 SE 110, 112; Marion Mfg. Co. vs. Board of Com. 126 SE 114; First National Bank vs. Weld, 264 US 450, 44 Sup. Ct. 385; Gorham Mfg. Co. vs. State Tax Com. 266 US 265; 45 S. Ct. 80. Whenever a statutory power or duty is conferred or prescribed upon the court, it can only be discharged by the essential tribunal, however composed, whether of one judge or several: Carter's Est. 254 Pa. 518, 527; Sterrett vs. McLean, et al, 293 Pa. 557, 566.

On two separate occasions, prior to taking the appeal, the appellant petitioned the lower court for a hearing upon exceptions, as required by Rules 68 & 69. (Appendix M) In each instance the petition was denied without explanation. (R. 2a) In Ebling vs. Schuylkill Haven Boro 244 Pa. 505, it was said that two judges sitting in an equity case can give no opinion on the facts or law until after the case has been heard on exceptions by the judges sitting en banc. For some undisclosed reason this principle was not applied in the instant case.

All the surrounding circumstances point to the conclusion that, when the judges instructed the court stenographer to misrepresent the facts with respect to the president judge, he knew that a court of two members had no jurisdiction and that he was otherwise disqualified to act in the premises: *Com. vs. Shawell*, 325 Pa. 497. APPENDIX N

The error is a substantial one because the lower court in its opinion has said (R. 306): ". . . the matter appears quite confused". An attorney should not be disbarred upon the contradictory and inconsistent testimony of a client. The court should have applied the Rule which is stated thus: "An examination of witnesses by the court means seeing and hearing them . . . not a mere reading of the testimony by a judge who neither saw nor heard them. It means that every member of the court passing upon the degree of guilt must see and hear the witnesses upon whose testimony the question is to be determined . . . In findings of fact by a judge . . . the credibility and weight to be given their testimony are for him, and their credibility is often sustained or impaired by their appearance on the witness stand and by their manner of testifying: *Commonwealth vs. Stauch*, 256 Pa. 620, 101 A. 72.

Since the record was fabricated, under the direction of the judge, so as to apparently conform to a Rule of the Court; since the Appellate court has condemned an attorney who *intentionally* presents the docket entries of the court below in an altered and garbled form; since the explanation mentioned in the Memorandum of the court does not excuse this deception; since the judge has said that "the matter appeared quite confused" to him; and, since the judge did not exercise that fidelity which is required by his oath of office there was an obstruction of justice, the lower court was without jurisdiction and the entry of the decree under Rule #215 was a violation of a substantive federal right.

IV. It Does Violate a Substantive Federal Right When One of the Parties, With the Knowledge of the Court, Induces Witnesses to Ignore a Subpoena.

Rule #215 (Appendix H) specifically provides that "such evidence as either party may desire to present shall be heard." An issue of credibility has been presented to the court. It involved the value and disposal of certain contractor's equipment, including gas and steam shovels recovered for the complainant by the appellant. (R. 271) The issue was included in the Complaint, Answer and Replication presented to the committee and the court.

The chancellor of the Bar Association, who was private counsel for the complainant issued a statement to the press respecting the merits of the complaint prior to its submission to the Bar Committee. (R. 205) Newspaper clippings of the statement were presented to the witnesses by the complainant and his attorney. (R. 290) In this manner the witnesses were persuaded to ignore the process of the court. Under a statutory provision a publication out of court tending to improperly bias the minds of the public, in reference to a cause pending, is an indictable offense: *Com. vs. Conroy*, 69 Pitts. Legal Journal, 273; *Com. vs. Myers*, 19 Pa. Dist. Rep. 1136.¹³

This flagrant meddling with witnesses was brought to the attention of the Bar Committee, which said: (R. 291) "The Committee has no interest in what the (complainant) did with these witnesses"; and (R. 297) "They are not going to be brought in". The subject was brought to the attention of the court at the outset of the hearing upon the Rule and Answer. (R. 33) It likewise manifested no interest in what the complainant and his attorney did with these witnesses.* Subsequently, the court attempted to

¹³ For context of the Act, see Appendix L.

* "Due consideration should be given by a judge to the fact that the administration of justice should be beyond the appearance of unfairness." : *Crawford's Estate*, 307 Pa. 102.

cover up this delinquency under the pretext that the testimony of the witnesses was "not controlling". (R. 313) For further particulars see Record 33, 50, 55, 59, 290, 297.

The explanation of the court is beside the point. It is contempt to influence a witness to absent himself from the proceedings before the court: Greason vs. Cumberland R. Co., 54 Pa. Supt. Ct. 595.

In a proceeding similar to the instant case it was said: "The charge of misconduct in a disbarment proceeding is similar to an indictment in that the accused is presumed to be innocent of the charge until he is proved guilty, and he is entitled to have the opportunity to present to the committee, to whom the matter is referred, any and all competent evidence which he believes will assist him in the matter of his defense." In *Re Donaghy*, 66 NE (2nd) 856, 858. See also *Cooke vs. U. S.*, 267 U. S. 517; *Pennoyer vs. Neff*, 95 U. S. 714, 715; and *Com. vs. O'Keefe*, 298 Pa. 169, where it was held that a party must be given a reasonable opportunity to present a defense. The appellant was deprived of the testimony of these witnesses, by the chicanery of the complainant and his attorney.

- V. The court should not consider the complaint of a witness who was in full possession of all the facts and remained silent until, after thirteen years, the competent witnesses are dead and the relevant correspondence destroyed especially when it was the duty of the witness to speak when the transaction occurred, and the court records discredit his testimony.

The general rule applicable to this class of case has been stated thus: "Staleness in a charge against an attorney may prevent its being considered, because an unreasonable delay in the presentation of a charge of misconduct may make it impossible for an attorney to procure the witnesses or the testimony which would have been available

at an earlier time to meet such charge. However, the court will not refuse to hear charges of unprofessional conduct against an attorney because of the expiration of a long period of time unless it would be unjust to compel him to answer such charges." 7CJS 766 sec. 25, sub. div. b.

In order to give color to the proceedings in the instant case the court has "made it appear" that one complaint was made by an individual and there was a second complaint by a B&L Association, of which the appellant was solicitor in 1932. (R. 69) Even the Bar Committee admits that no complaint was made by or with the authority of a building and loan association. (R. 68) Instead it was made by an individual director who has been linked with the son-in-law of the individual complainant first mentioned. (R. 71) It is true that the merits of the charges do not depend upon the motives of the instigator thereof; but, on the other hand, it is also true that the office of the Bar Association should not be used as an instrument for the furtherance of private grudges, and that evidence which bears earmarks of private spite should be scrutinized with extreme caution: *Peck vs. State Bar Asso.*, 17 Pac. (2nd) 112. It is admitted by the complainant that in 1932-33, the subject was a topic of general discussion at the meetings of the directors of the association, (R. 70); and, it is also admitted that, in 1932-33, there was "no reason" for complaint. (R. 71) The instant case is not to be confused with those cases where the alleged dereliction was concealed by the attorney as in *Re Anderson*, 19 NE (2nd) 330, 333. Nor with those cases where the alleged misconduct has continued down to a comparatively recent date as in *Re Williams*, 128 SW (2nd) 1098, 1107.

The adjudication in *Re Elliott*, 84 Pac. Rep. 750, 752, seems to parallel the instant case in many particulars. The syllabus by the court recites: "While there is no statute of limitations which is technically applicable to a disbarment proceeding, yet where the alleged misconduct set forth in a charge is shown to have occurred more than thirteen

years before the charge is filed in this court, and it appears that proceedings to investigate the occurrence were instituted soon thereafter and proceeded so far that an accusation was prepared and the accused made known his defense thereto, and that thereupon the district court having jurisdiction, and the members of the bar thereof dropped further proceedings, and thereafter the judge of said court and the members of the bar recognized the accused professionally and socially, this court will not consider the charge. It is at least stale."

The witness who makes the complaint is a mere volunteer and does not pretend that he is speaking for or on behalf of the B&L Association. (R. 68) It is sometimes said loosely that the powers of a corporation are exercised by the directors but that statement is not true. While the official declarations of the body as such are the act of the corporation declarations of an individual director have no such effect in the absence of authority to make them. (Raish vs. Orchard, 218 Pac. 655, 656; Bank vs. Cooper, 36 Me. 179; Manufacturing Co. vs. McAllister, 36 Mich. 327; Bridge Co. vs. Bachman, 66 NY 261; Salado College vs. Davis, 47 Tex. 131). If this were not true, then one director by his declaration could commit the corporation in defiance of the will of all the other directors. There is not a suggestion in the record that any director of the association was authorized to speak for the Board; hence, the court has misstated the facts in its opinion when it alleges that a charge was made against the appellant by the association.

The circumstantial evidence confirms the fact there was "no reason" for complaint because the complaining witness testified that the appellant tendered a check for the funds at the meeting of the directors; that he did not know whether the check was accepted (R. 70); and he was unable to name a single director who was present when the tender was made. (R. 71) Acquiescence may be evinced by mere silence under circumstances giving rise to a duty

to speak: Am. Juris, vol. 2, p. 88, sect. 232. The silence of the Board of Directors, as well as that of the complaining witness creates the presumption that the management of the settlement was approved by them at the time it was made: Indianapolis Rolling Mill vs. St. Louis FW&WR Co. 120 US 256; Union Gold Min. Co. vs. Rocky Mt. Nat. Bank, 96 US 640. It has been held that where a client knew, as in the instant case, that a case had been settled and remained silent for five years, the failure of the attorney to promptly report the terms of the settlement did not warrant even a suspension; In Re Brummond 44 NE (2nd) 833. The case falls within the rule that proceedings instituted after a great lapse of time from the commission of the act complained of are regarded with disfavor and the court should refuse to hear the complaint: 5 Am. Juris, p. 434, 435, sect. 288.

Since the treasurer of the association to whom the check was tendered, is now dead and the relevant correspondence destroyed there is no method by which the appellant can prove the tender was made immediately after the funds were received in November, 1932. They were not accepted by the treasurer of the association because the tender was made subject to the conditions of the settlement agreement as is more particularly recited in the Record at p. 78. Failure to preserve the correspondence, after thirteen years have elapsed, creates no suspicious circumstances: In Re Amaden, 44 NE (2nd) 558, 562.

There are material allegations in the testimony of the witness which not only lack evidential support but are conclusively shown to be untrue. Thus it was said by the complainant that the attorney for the judgment creditor told him that the appellant had "assigned the bid". (R. 70) The court records disclose that the B&L retained its judgment until the settlement was completed. There was no sale of the property until six months later. (JMH 3751/57) Therefore, the statement of the witness, with respect to what the deceased attorney told him, is contradicted by the court record.

Disbarment of an attorney can only be warranted by clear and satisfactory proof, showing not only acts of misconduct but fraudulent or dishonest motives: In *Re Smith*, 5 NE (2nd) 227. Again, it is said "the case made by the record must not only be free from doubt as to act charged but as to the motive with which it was done.": In *Re Lasecki*, 192 NE 655, 657.

In the instant case there is no evidence that the appellant acted in bad faith with respect to the management of the settlement. Since the B & L made no complaint there is no reason why the court should "make it appear" that it did. The results were satisfactory to the association and it accepted the fund in accordance with the settlement agreement made by the appellant with the deceased attorney. The appellant was paid for the services rendered and the case was closed until the Bar Association was confronted with the exposure of its chancellor and the discovery that the complainant and his attorney had meddled with the witnesses. The judge was likewise embarrassed by reason of his relations with the brother of the attorney-witness whose credibility and good faith were involved in the proceedings." Therefore, it was the duty of the appellate court to adjudicate the question, pertaining to these matters, which was presented to it.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for the allowance of a Writ should be granted.

Respectfully submitted,

Counsel for Petitioner.

APPENDIX A

APPELLATE JURISDICTION OF THE SUPREME COURT OF PENNSYLVANIA UNDER THE ACT OF MAY 19, 1897 PL 67 SECTIONS 2 AND 4 AND THE AMENDMENTS THERETO. (SEE PURDON'S SUPPLEMENT TITLE COURTS VOLUME 12 PAGE 101.)

Section 1134 Certiorari: Return of Record.

When an Appeal has been entered the Prothonotary of the Appellate court shall issue a Writ, in the nature of a Writ of Certiorari, directed to the Court from which the appeal is taken, requiring said court to send to the Appellate Court for review the record in the cause or matter wherein is entered the sentence, order, judgment or decree appealed from on or before the Saturday prior to the first day of the week fixed by the Appellate Court for the argument of said appeal, and no appeal shall be considered perfected until such writ be filed in the court below. The Appellate court may, by Rule or special order without prior notice to the court below, require said record to be prepared, certified and forwarded by the court below at an earlier date than that mentioned in the Writ whenever the record may be needed in any matter connected with said appeal. The prothonotary or clerk shall prepare and forward the record to the appellate court, duly certified by any judge of the court below, on or before the date mentioned in said writ or in such Rule or special order (1897, May 19, PL 67 Sect. 4) 1136 Limitation of Appeal.

No appeal shall be allowed in any case from an order judgment or decree of any Court of Common Pleas or Orphan's Court, unless taken within three calendar months from the entry of the order, judgment, or decree appealed from, nor shall an appeal supersede an execution issued or distribution ordered, unless taken and perfected, and bail entered in the manner herein prescribed within three weeks from such entry. No appeal shall be allowed in any case,

from a sentence or order of any court of Quarter Sessions or oyer and terminer, unless taken within forty-five days from the entry of a sentence or order. An appeal from the Superior to the Supreme Court must be taken and perfected within forty-five days from the entry of the order, judgment or decree of the Superior Court. Appeals taken after the time herein provided for shall be quashed on motion: Provided that the limitation of forty-five days, provided by this amendment for an appeal from an order or sentence of a court of Quarter Sessions or oyer and terminer, shall only apply to cases in which the sentence, order, judgment or decree appealed from is entered after the first day of July one-thousand nine hundred and twenty-seven. Appeals from sentences, orders, judgments, or decrees, entered prior to the first day of July, one thousand nine hundred and twenty-seven, shall be allowed if taken within three calendar months from the date of the entry of such sentence, order, judgment, or decree as herein provided (1897, May 19 PL 67 Sect. 4; 1923, March 22, PL 30 Sect. 1; 1925 March 12 PL 32, Sect. 1; 1927, May 11, PL 972, No. 464 Sect. 1)

APPENDIX B

THE NATURE OF THE COMPLAINT

I. The Complaint will be found in the Record at page 81; the Answer thereto at page 84; and the Replication at page 90.

The appellant said that property involved in litigation was valued at \$79,750. (R. 185); that the complainant agreed to pay for the service rendered according to the sum realized from a resale of the property (R. 221); and that the complainant, in writing, said he would make payment under this agreement made in 1933 (R. 128, 129).

The complainant and his attorney said the property recovered was obsolete; that in 1933 it was valued at \$500 (R. 220, 237); that it was abandoned as worthless (R. 132,

219); and that appellant had been compensated for all the service rendered. (R. 128)

The appellant was corroborated by the testimony of a bank officer who participated in the transaction (R. 175); by the documentary evidence (R. 51, 128, 129); and the employees of the complainant. (R. 264, 266, 283, 284, 285, 286).

The complainant was corroborated by the hearsay testimony of his wife (R. 100, 101, 102, 103, 128); and by that of his attorney who acted as chancellor for the Bar Association and a witness at the same time. (R. 219, 220, 237)

The findings of the court with respect to the private sale of two mortgages pledged as collateral with the appellant is without any evidence in the record to support it. The facts and the court records with reference thereto will be found at pages 202, 203.

II. One year after the conclusion of the hearings by the committee of the first complaint, a petition for a Rule to Show Cause was presented to the Court. (R. 1.) Annexed to this petition was a second complaint involving a property owned by the son-in-law of the first complainant. (R. 71)

The gist of this second complaint is that in 1932 and 1933 the appellant, as solicitor of a building and loan association, did not properly manage a foreclosure settlement with the attorney for a judgment creditor who held a junior lien. The proceedings began in November, 1932 and were concluded in May, 1933. The subject was a topic of discussion at the meetings of the board of directors at that time. (R. 70) There was no reason for complaint then. (R. 71) The two competent witnesses have since died. Complaint with respect thereto was first made in 1945, after the relevant correspondence had been destroyed.

APPENDIX C

THE CIRCUMSTANCES UNDER WHICH THE APPEAL WAS PERFECTED IN THE LOWER COURT AS SET FORTH IN PETITION FOR REHEARING (R. 443)

The lower court had entered a final decree (R. 1a) in violation of Rules No. 68 and 69 (Appendix M). Documentary evidence had been removed from the record by the court or the Bar Association. (R. 341, par. 3; R. 360, 361, pars. 45, 46). The facts are not denied. It was necessary to recover these missing documents in order to formulate exceptions thereon. The lower court refused to cooperate in the search, which was delegated to the court clerk, who was not familiar with the record. He departed for California and delegated the search to the assistant clerk, who knew even less about the record.

The original request for exceptions was presented on April 11, 1946. (R. 1a) This was nine days after the entry of the original decree. Three additional written requests were presented. Frequent inquiry with respect thereto brought no action until October 11, 1946. (R. 3a) This was exactly six months after the original request had been presented on April 11. The court then allowed all the exceptions, but one, and issued a nunc pro tunc, with consent of both parties, under which the writ of Certiorari was perfected in the lower court as of August 6, 1946. (R. 3a)

APPENDIX D

PRACTICE RULE NO. 63

At any time prior to that herein fixed for the filing and service of the Brief of Appeals, he may move,—but without relieving him of the duty of filing and serving his brief within the time prescribed by these rules,—(1) to remit to the Superior Court because the appeal should have been taken thereto; (2) to dismiss for want of jurisdiction,

or because the controlling question has, for any reason, become moot, or because an appeal has been waived; or (3) to quash for other reasons appearing of record. Any two or more of these motions may be filed at the same time. A copy of the motions, and papers attached thereto, shall be filed in this court and served on the opposite party, who may reply within five days after service thereof. Matters averred in either motion or answer, which do not appear of record, must be sustained by an affidavit of the truth thereof, and, if controverted, must be supported by depositions. The court may grant or refuse the motion, in whole or in part; may postpone consideration thereof until the hearing of the case on the merits; may order the case on the short list for a speedy hearing, on the merits alone or in conjunction with the motion; or may make such other order as the justice of the case may require.

APPENDIX E

PRACTICE RULE NO. 73

Any case upon any list may, by agreement of counsel, be submitted without argument any day at the opening of the court or immediately succeeding the recess, counsel stating the question to be decided, and how it arose, if requested so to do by the presiding justice.

APPENDIX F

QUESTIONS INVOLVED IN THE BRIEFS AND RECORD SUBMITTED FOR ADJUDICATION TO THE SUPREME COURT OF PENNSYLVANIA.

Appellant's Statement

1. Where a Rule states that three judges "wit sit at a hearing" of a complaint: Has the Court jurisdiction to enter a decree thereunder where two judges heard only

some witnesses; the third was absent; and argument upon Exceptions denied? (Affirmed) *

2. Where a judge fabricates his Court record to apparently conform with a Court rule, entering a decree upon a known false premise: Is this an obstruction of justice? (Negatived) *

3. Do the facts outlined in Questions 1 and 2 involve a violation of the Federal or State Constitution? (Negatived) *

4. Upon an issue of credibility, it was alleged that witnesses were induced to ignore a subpoena: Should the Court have investigated failure of the witnesses to appear? (Negatived) *

5. Should an attorney be disbarred upon a client's contradictory and inconsistent testimony, refuted by a disinterested witness? (Affirmed) *

6. Does a party waive an agreed civil suit verdict, wherein he did not testify, by offering direct evidence upon the same issues before the Bar Ass'n? (Negatived) *

7. Under the facts outlined in Questions 5 and 6: Should respondent be required to account for surplus salvaged from collateral without a reciprocal account from complainant? (Affirmed) *

8. Where an individual director of a B & L Ass'n, aware of the facts, admitted there was no reason for complaint in 1932: Should he, in 1945, after material witnesses are dead, complain that its solicitor was delinquent? (Affirmed) *

9. Is it a violation of Federal or State Constitution to disbar an attorney under facts outlined in Question 8? (Negatived) *

10. Should a judge reveal his private relations with the brother of an attorney-witness, whose credibility and good faith are involved in the proceedings? (Negatived) *

Appellee's Counter-Statement

1. Will the findings of fact, conclusions of law and order of disbarment, entered by the Court below, (involving the credibility of witnesses and the weight to be given to their testimony), when based upon evidence in the record and the findings of fact of the Committee of Censors, be disturbed by your honorable court on appeal?

2. May an order of disbarment be vitiated for constitutional reasons when the appellant has agreed to the absence of one of the three hearing judges and has acquiesced in such absence throughout the hearing held by the Discipline Court, and such judge has read the record and concurred in the opinions and order of disbarment?

APPENDIX G

PRACTICE RULE No. 84

Petitions for rearguments must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; and must specify particularly the point supposed to have been overlooked or misapprehended by the court (with a proper reference to the portions of the original Brief or Record relied on to establish the fact alleged) the reasons for a rehearing, and arguments in favor thereof. Attached thereto shall be a copy of all the opinions filed in the case; and, accompanying it, a copy of all the Briefs used in the argument of the case.

* The terms "Affirmed" and "Negatived" represent the action of the lower court. None of these questions were adjudicated by the Appellate Court.

APPENDIX H**RULE 215 OF THE COURTS OF COMMON PLEAS OF
PHILADELPHIA COUNTY ADOPTED MARCH 5,
1942.****ATTORNEYS—DISCIPLINE—DISBARMENT—REIN-
STATEMENT**

215(1). Whenever the Committee of Censors of the Philadelphia Bar Association shall, after full hearing of a complaint against a member of the Bar, deem the case one for consideration by the court, it may file a petition in the proper court presenting the facts and praying for a Rule on the respondent to Show Cause why he should not be disciplined. In assigning to the several courts of Common Pleas petitions instituted for disciplining members of the Bar, the Prothonotary shall not use the wheel, but shall immediately upon receipt of such petition assign it in accordance with these Rules, that is for a period of two months beginning March 1, 1942, to the Court of Common Pleas No. 1 and thereafter for each succeeding two months to the several courts of Common Pleas in their numerical order, returning again to the Court of Common Pleas No. 1 after having finished with the Court of Common Pleas No. 7.

If more than three Rules for discipline be filed in any one period of two months, such additional Rules shall be referred to the next numerically succeeding court until three additional Rules shall be so assigned, the purpose being to divide the decision of such Rules fairly equally among the seven courts of Common Pleas so that not more than three such Rules shall be assigned to one court during any bi-monthly period.

The Court to which any petitions of the foregoing nature may be assigned hereunder will designate one of its judges to preside at the hearing of such petition, and will (acting under the provisions of the Act of March 8, 1895, PL 5) request each of the two numerically succeeding courts to designate a judge to sit with the judge first designated

at the hearing of such rules.

At the hearing of the Rule, the respondent may appear and make answer thereto and may summon such witnesses in his behalf as he desires. At such hearings the committee shall also be represented, and shall hand to the court a transcript of the testimony taken before it, and the findings of fact and the opinion of the committee. After a full hearing by the court, at which such evidence as either party may desire to present shall be heard, the court shall take such action on the Rule as shall be decided by a majority of the judges present at the hearing to be right and just in the premises.

The court in its discretion may direct that a report of its action may be published at least once in *The Legal Intelligencer*.

(2) Any attorney whose name shall be stricken from the rolls of any of these courts, or of the Supreme or Superior Court or the Orphans' Court of this County, shall thereby be disqualified from practicing in these courts, unless the Court making the order shall otherwise direct.

(3) Petitions for reinstatement after disbarment, or for relief from suspension from practice or other discipline imposed by any of these courts, shall be filed in the same Court as of the term and number of the proceeding in which the disbarment, suspension or other discipline was imposed. The court in which such petition is filed will fix a day for hearing the same, and notice thereof together with a copy of the petition shall forthwith be given to each of the President judges of these courts and to the Committee of Censors of the Bar Association, and also, if it be a petition for reinstatement, to the County Board of Law Examiners which may answer the Petition, and furnish to the judges such information as may be helpful. Notice of said hearing and the character of the relief prayed for shall be published in the *Legal Intelligencer* at least ten days previous thereto. Such petition will be heard in the same manner and by the

same procedure as provided in Paragraph (1) hereof for the hearing of original petition for discipline.

HISTORICAL NOTE

Beginning in 1912 and continuing thereafter until 1926 disbarment proceedings in the Courts of Common Pleas of Philadelphia County were conducted under the following Rule:

223—Disbarment—Any attorney whose name shall be stricken from the rolls of any of these courts, or of the Supreme Court, or Superior Court, or the Orphans Court of this County, shall thereby be disqualified from practice in these courts, unless the court making the Order shall otherwise direct.

Proceedings were initiated under a Petition for Rule to Show cause and an Answer thereto, as is illustrated in Wolf's Disbarment, 228 Pa. 331 (1924). No provision whatsoever was made as to how many judges should participate in the proceedings.

On March 19, 1926 the Board of Judges made a general revision of all the Rules of Court effective the first Monday of June, 1926. Rule 223, above mentioned, was incorporated in the revision as Rule #214 and, with respect thereto, Rule 215 was added as follows: (Legal Intelligencer, March 26, 1926)

214—Any attorney whose name shall be stricken from the rolls of any of these courts, or of the Supreme Court or Superior Court, or the Orphans Court of this County, shall thereby be disqualified from practice in these courts, unless the court making the Order shall otherwise direct.

215—Whenever the Committee of Censors of the Law Association of Philadelphia shall, after full hearing of a complaint against a member of the Bar, deem the

case one for consideration by the court, it may file a Petition in the proper court presenting the facts and praying for a Rule upon the respondent to Show Cause why he should not be disciplined. On the return day of this Rule a hearing shall be had before the court, at which the respondent may be present with his witnesses to defend himself, and at which the committee also shall be represented. At such hearing the committee shall hand to the court a transcript of the testimony taken before the committee and the findings of fact or opinion of the committee in the premises. After full hearing in court, at which such evidence as either party may desire to present shall be heard, the court shall take such action as to disciplining the member of the Bar so complained against or in dismissal of the complaint as shall be right and just in the premises. The court in its discretion may direct that its action be published at least once in the Legal Intelligencer.

At a regular meeting of the Board of Judges held on June 3, 1932, Rule 214 $\frac{1}{2}$ was adopted, as follows: (Legal Intelligencer, June 10, 1932)

214 $\frac{1}{2}$ —A Rule granted upon a Petition for the reinstatement of a lawyer who has been disbarred, or for relief of a lawyer from discipline imposed by the court, shall be made returnable not less than ten days from its allowance, and notice thereof, together with a copy of the Petition, shall be served upon the Committee of Censors of the Philadelphia Bar Association, which may answer the Petition and furnish to the court such information as may be helpful for its consideration thereof.

Concurrently with this new Rule, Rule 215 was amended by adding thereto the following sentence:

"The Cannons of Professional Ethics of the American Bar Association as adopted by the Pennsylvania Bar

Association are hereby adopted as Rules of Conduct for members of the Bar of these Courts."

At a special meeting of the Board of Judges on January 11, 1933 Rule 214½ was incorporated into Rule 215 and Rule 215 was further amended to read as follows: (Legal Intelligencer January 20, 1933)

215—The Cannons of Professional Ethics of the American Bar Association as adopted by the Pennsylvania Bar Association, are hereby adopted as Rules of Conduct for members of the Bar of these courts. Whenever the Committee of Censors of the Philadelphia Bar Association shall, after full hearing of a complaint against a member of the Bar, deem the case one for consideration of the court, it may file a Petition to Show Cause why he should not be disciplined. *The President Judge of that court under the provisions of the Act of March 9, 1885 PL 5 shall thereupon inform the President Judge of each of the other Common Pleas Courts of the date of the return day of the Rule and the place of the hearing, and request a judge from each of the said five courts to sit with him and determine the matter.* At this hearing the respondent may be present with his witnesses to defend himself and the committee shall also be represented. At such hearing the committee shall hand to the court a transcript of the testimony taken before the committee and the findings of fact and opinion of the committee in the premises. After full hearing before the court, at which such evidence as either party may desire to present shall be heard, the court shall take such action as to disciplining the member of the Bar so complained against, or in dismissal of the complaint, as shall be decided by a majority of the judges present at the hearing to be right and just in the premises. The court in its discretion may direct that its action be published at least once in the Legal Intelligencer.

A Rule granted upon Petition for the reinstatement of a lawyer who has been disbarred, or for the relief of a lawyer from discipline imposed by the court, shall be returnable not less than ten days from its allowance, and notice thereof together with a copy of the Petition, shall be served upon the Committee of Censors of the Philadelphia Bar Association and an additional copy thereof shall be furnished to each one of the five judges, and the committee of Censors may answer the Petition and furnish to the court and to each one of the President Judges such information as may be helpful in their consideration thereof. Such Petition to be heard in the same manner and by the same procedure as provided above for the determination of Rules of Discipline.

This is the first instance wherein the Rule provided that a specific number of judges should sit on the hearing of a complaint. At that time certain prominent members of the local Bar became involved in the "Numbers Racket." The courts decided to act as a unit. Hence, the amendment to the Rule. The hearings were held before a joint session of the "President Judges of each of the Common Pleas Courts". There were five Common Pleas Courts at that time: *In Re Disbarment Proceedings* 321 Pa. 84.

The Amendment of June 11, 1933 remained in effect until March 5, 1942 when the present Rule 215 was adopted providing for a hearing before three judges selected as therein provided. There are now seven Common Pleas Courts. Incidentally, Rule 214 adopted March 19, 1926 is the same as paragraph 2 of the present Rule 215, adopted March 5, 1942. The present Rule 214 refers to contingent fees collected in personal injury cases and has no application to the question herein involved.

This proceeding is the first instance, since the amendment of 1933, wherein the question of the number of judges required to be present under the amended Rule was submitted to the Appellate Court. It neglected to adjudicate the issue.

ADDENDA

RULE OF THE COMMON PLEAS COURTS OF
MONTGOMERY COUNTY, PA.

Rule #2, Section 5, Sub-division A.

"The disbarment or suspension of attorneys shall be governed by the Rules of practice and procedure of the Committee of Censors of the Bar of Montgomery County, provided that the court may make such orders on its own motion as may be deemed necessary or advisable."

NOTE: The case of Montgomery County Bar Ass'n vs. Rinalducci, 329 Pa. 296, was presented to the courts of Montgomery County under the foregoing Rule. An examination of the Rule discloses that it makes no provision for a hearing of witnesses by the court nor does it prescribe the number of judges who will "sit at the hearing." The interpretation of this Rule has no application to the case submitted to the Common Pleas Court of Philadelphia under its present Rule #215.

APPENDIX J

THE VERITY OF THE RECORD

The question did not become an issue until the court, without notice to the appellant, entered a final decree on March 30, 1946. A copy thereof was delivered by mail to the appellant on April 3, 1946. On April 11, 1946 the appellant petitioned the court to correct the record, reciting, inter alia, that the court did not see or hear the witnesses. (R. 323, par. 1, 327, par. 16) A hearing upon the question was denied on May 2, 1946 (R. 2a) A second Petition to correct the record was filed on May 16, 1946. It also recited that "the court did not see or hear the witnesses." (R. 340, 360, 361, par. 46) A hearing upon this question was denied on June 12, 1946. (R. 2a)

On August 5, 1946, the appellant filed an affidavit specifically charging that the court record is false because (R. 368): "In violation of this Rule (#215), McDevitt, J. withdrew immediately after these proceedings began and after he had assured the respondent: 'You are entitled to have your defense heard.' McDevitt J. did not return to the bench at any time thereafter. He did not hear the testimony of a single witness. An essential part of the adjudication is based upon the testimony of these witnesses. Nevertheless, McDevitt, J. signed the opinion of the court, which was prepared by Flood, J."

The court stenographer certified that his notes were correct. (R. 397a) Flood, J. approved the certificate. (R. 397a) On September 9, 1946, the court stenographer amended the record. He certified that he had been instructed by Flood, J. (R. 397a) "Let it appear that McDevitt, J. was present." There is no denial by the court that the stenographer was instructed to make this false entry. And it is not alleged by the stenographer that these instructions were given to him within the hearing of the appellant.

In a Memorandum filed by the court on October 11, 1946 it is said: "McDevitt, P. J. was unable to remain because of an engagement in a trial in another court-room, and it was then agreed by the defendant and by counsel for the complainant that the Notes of Testimony would be submitted to McDevitt, P. J. and that his decision would have the same force and effect as though he were present throughout" . . . and that "the acquiescence of the defendant precludes his right to an Exception at this late date." (R. 398a) The date to which the Memorandum refers is October 11, 1946. And, the Stipulation to which the Memorandum refers will be found at pages 35 and 36. (R. 35 & 36)

An examination of the context of the Stipulation discloses that it makes no reference to those witnesses who were in court on October 15 and November 1 when the

hearings were held. (R. 35, 36) Further, it is alleged by the court that the appellant acquiesced in the agreement. An examination of the record discloses that, just prior to the Stipulation, McDevitt, J. said that it would serve no "useful purpose" for him to hear or see the witnesses who appeared before the committee. The Stipulation was limited to those witnesses.

The language used by the court, with respect to hearing the witnesses, was very emphatic. The printed page does not reflect the spirit of impatience manifested by the judge and his lack of interest in the proceedings. The implications arising therefrom discount the allegations of the court that the Stipulation was of a voluntary character and that the appellant acquiesced therein.

APPENDIX K

THE PRIVATE RELATIONS BETWEEN ONE OF THE JUDGES AND THE BROTHER OF AN ATTORNEY-WITNESS WHOSE CREDIBILITY AND GOOD FAITH WERE INVOLVED IN THE PROCEEDINGS.

Walter B. Gibbons, Esq. was the chancellor of the Bar Association and also private counsel for the complainant, Duffin, Sr. (R. 97a) He prepared the complaint, conducted the proceedings before his committee and also testified in his own defense. (R. 293-294) During the proceedings Mr. Gibbons became unexpectedly involved in the fraud of Duffin, Sr. and his sons with reference to the bankruptcy proceedings of Duffin Bros. in its relation to the settlement of the estate of Jane Duffin. This subject was incorporated in the complaint presented to the committee.

The private relations between Flood, J. and the brother of attorney Gibbons was discovered while the appellant was engaged in the quest for the missing documents and endeavoring to overcome the various obstacles which would have impeded an examination of the issues by the appellate

court. An affidavit respecting this New Matter was presented to the lower court. (R. 368) The document recites that the brother of attorney Gibbons was head of a private organization described as a Retreat League. It advocates moral principles of the very highest character.

Flood, J. was a member of the Board of Directors and also chairman of its Planning Board. In conjunction with the brother of attorney Gibbons, the judge, as chairman of the Planning Board, was soliciting the sum of \$125,000., which was to be expended under the immediate supervision of the judge. None of these facts were denied by the judge in the Memorandum which he filed in reply. (R. 398)

The Bar Association of which attorney Gibbons was the chancellor, delayed its petition to the court until a time when, under the operation of Rule 215, Flood, J. would be eligible to take charge of the proceedings. He issued the Rule to Show Cause; he had control of the record; he knew that attorney Gibbons had an interest in the proceedings outside that of the ordinary duty of an attorney to his client; he instructed the court stenographer to "let it appear" that the proceedings were conducted as provided by Rule 215; he refused to account for documentary evidence, produced by the petitioner, which had been removed from the record, (R. 341, par. 3; R. 360, 361, pars. 45, 46); he inserted into the record a fictitious statement of facts with respect to the sale of collateral by the petitioner (R. 202, 203, 335); and he wrote the opinion of the Court. (R. 304a)

The judge, concurrently, devoted part of his time to his judicial duties and part to the collection of the \$125,000. As a result of this divided attention, the judge overlooked part of the record which linked attorney Gibbons with the fraud of Duffin Bros. in the bankruptcy proceedings and the settlement of the estate of Jane Duffin. Commenting thereon the judge said: (R. 64) "We don't even have a reference to the bankruptcy petition which we can't take notice of." An examination of the record discloses that

this statement is untrue. (R. 52, 58, 59)

The sons of the complainant, presented a Petition in Bankruptcy in September, 1936. They were represented by attorney Fagles. (R. 52) The debtors concealed their undistributed interest in the estate of Jane Duffin (R. 54) They also said that they did not have possession or use of any of the equipment which Duffin, Sr. purchased at sheriff sales in 1933. (R. 53) At the hearing before the committee the court record established that the first of these statements is false, (R. 51) ; and, the employees of Duffin Bros. established that the second statement is also false. (R. 264, 266, 283, 284, 285, 286) The debtors were present and made no denial of the facts.

In February, 1937, Duffin Bros. were discharged without payment of any dividend to the creditors. The total loss was \$112,000. (R. 52) One of the creditors was the Sterling Motor Co. (R. 52) It was represented by Attorney Gibbons. (R. 58, 59) He had been employed in 1933 to collect a debt of \$8,000 from Duffin Bros. (R. 59) Mr. Gibbons represented to the Bar Committee that the assets of the debtors were obsolete and worthless. (R. 132, 220) The only action taken by him was to present the claim in the bankruptcy proceedings of 1936. (R. 53)

Mr. Gibbons represented the complainant as administrator of the estate of Jane Duffin. (R. 51) The fraud which had been perpetrated by Duffin Bros. was brought to his attention before the administrator was discharged. (R. 145) Nevertheless, attorney Gibbons, without advising the Sterling Motor Co. of the facts, prepared an assignment of the interests of the fraudulent debtors to the complainant individually. (R. 51)

By reason of these facts the judge should have revealed his private relations with the brother of the attorney-witness whose credibility and good faith were involved in the proceedings. He would have been less than human if he was not influenced and his judgment swayed thereby. He knew why the complainant and his attorney had persuaded the witnesses to ignore the summons. (R. 290)

APPENDIX L

ACT OF JUNE 24, 1939 P. L. 872, sect. 324 (SEE PURDON'S SUPPLEMENT VOLUME 28, sect. 4324).

Whoever lawfully dissuades, hinders or prevents, or attempts to dissuade, hinder or prevent any witness from attending and testifying before any committee of the Legislature, or before any court, judge, justice, or other judicial tribunal, when so required by virtue of any legal process or otherwise, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars (\$500), or undergo an imprisonment not exceeding one (1) year, or both. 1939 June 24, P. L. 872, sect. 324.

APPENDIX M

PRACTICE RULE 68.

Upon the filing of the adjudication, the prothonotary shall enter the decree nisi and give notice to the parties, or their counsel of record, of the entry of the decree.

PRACTICE RULE 69.

Within ten days after notice, exceptions may be filed by either party, which must cover all his objections to rulings on evidence, to the findings and conclusions of the chancellor, to the decree nisi, and to a failure or refusal to find any matter of fact or law substantially as requested. Exceptions charging failure or refusal by the chancellor to answer substantially any requests which is the basis of the exception. Objections not covered by the exceptions filed shall be deemed waived, and shall not thereafter be made the subject of controversy, either in the trial court or on appeal, unless, prior to final decree, upon cause shown, exceptions covering such matters are permitted to be filed *nunc pro tunc*.

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INDEX.

	Page
I. Questions Presented	1
II. Argument	2
1. No Substantial Federal Question Arises Out of the Entry of the Order of Disbarment and Proceedings in Connection Therewith	2
2. No Substantial Federal Question Arises Out of the Action of the Pennsylvania Supreme Court Quashing the Appeal on Its Own Motion and Dismissing the Petition for Rehearing	3
3. Conclusion	5

TABLE OF CASES CITED.

	Page
Ex Parte Burr, 9 Wheat (US) 529	3
Commonwealth v. Greenfield, 103 Pa. Superior Ct. 489	3
Department of Banking, State of Nebraska v. Pink, 317 U. S. 264	4
Edmonson v. Bloomshire, 74 U. S. 306	3
Emmons v. Smitt, 149 F. 2d 869, 871, cert. den., 326 U. S. 746	2
Fenerty Disbarment Case, 356 Pa. 614, 616	2
Menza B. Grace v. Board of Commissioners of the State Bar of Alabama, 320 U. S. 708	3
Jones v. Marion Coal Company, 227 Pa. 509	3
State of Missouri at the Relation of Leon Hurwitz v. Emmett P. North, 271 U. S. 40, 42	2
Moyerman's Case, 312 Pa. 555, 562	2
Bernard B. Selling v. George W. Radford, 243 U. S. 46, 50	3
Snyder v. Commonwealth of Massachusetts, 291 U. S. 97, 105	4
Re Clyde Wilson Summers, 325 U. S. 561, 570	3
Tinkoff v. West Publishing Co., 152 F. 2d 754, cert. denied, 67 S. Ct. 75	3

IN THE
Supreme Court of the United States

No. 298. OCTOBER TERM, 1947.

In the Matter of

WILLIAM S. FENERTY.

**BRIEF OF THE COMMITTEE OF CENSORS OF THE
PHILADELPHIA BAR ASSOCIATION IN OPPOSI-
TION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE COMMON-
WEALTH OF PENNSYLVANIA.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The Committee of Censors of the Philadelphia Bar Association, Respondent, respectfully submits this brief in opposition to the Petition of William S. Fenerty for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

I. QUESTIONS PRESENTED.

We have thoroughly searched the record, but have been unable to find that it presents any federal question of substance which merits the consideration of your honorable court.

As more fully appears in our argument, with due deference to the petitioner, we cannot agree that he has arrived at an accurate appraisal of the issues nor has he developed through the questions propounded in his brief any cognizable or review-worthy problems.

II. ARGUMENT.

1. No Substantial Federal Question Arises Out of the Entry of the Order of Disbarment and Proceedings in Connection Therewith.

At the outset, it is well to emphasize that the petitioner has had his fair day in court and has had a full hearing on the points he strives to make under III, IV and V of his questions presented.

As stated in the opinion of the Pennsylvania Supreme Court, *Fenerty Disbarment Case*, 356 Pa. 614, 616, petitioner appeared at the meetings of the Committee of Censors of the Philadelphia Bar Association, cross-examined witnesses and testified. He likewise appeared at the hearings in court, cross-examined witnesses and testified. Both these bodies independently found that based on the evidence adduced the disbarment was merited. In the Discipline Court petitioner presented several petitions for reconsideration of the order of disbarment (R. 350a, 359a, 368a).

The Pennsylvania Supreme Court which reviews disbarment cases de novo (*Moyerman's Case*, 312 Pa. 555, 562), thus expressed itself: "The opinion written in support of the order of disbarment fully vindicates the conclusion of the court. If the matter were properly before us for review we should be required to affirm the order": *Fenerty Disbarment Case*, 356 Pa. 614, 616. Hence all three forums deliberating the problem decided adversely to petitioner and found his disbarment to be warranted.

In other words, the record fails to show that petitioner was denied any reasonable opportunity to fully tell his side of the story. The contention that he was denied the benefit of due process therefore necessarily cannot stand: *State of Missouri at the Relation of Leon Hurwitz v. Emmett P. North*, 271 U. S. 40, 42; *Emmons v. Smitt*, 149 F. 2d 869, 871, cert. den., 326 U. S. 746.

In the absence of a clear showing of the violation of a federal right secured by the Fourteenth Amendment, your honorable court has been loathe to interfere with the responsibility of a state over the choice and discipline of the personnel of its own bar: *Re Clyde Wilson Summers*, 325 U. S. 561, 570; *Bernard B. Selling v. George W. Radford*, 243 U. S. 46, 50; Cf. *Ex Parte Burr*, 9 Wheat (US) 529.

A substantial federal question has not been made out in this phase of petitioner's case: *Menza B. Grace v. Board of Commissioners of the State Bar of Alabama*, 320 U. S. 708.

2. No Substantial Federal Question Arises Out of the Action of the Pennsylvania Supreme Court Quashing the Appeal on Its Own Motion and Dismissing the Petition for Rehearing.

It clearly appears of record that petitioner did not perfect his appeal to the Supreme Court of Pennsylvania within the time limited by statute. The docket entries show the order of disbarment as being entered March 30, 1946 (R. 1a), and the certiorari from the Supreme Court as not being filed until October 22, 1946 (R. 3a), nearly seven months thereafter.

Contrary to the assertions of petitioner, despite rules of court governing the procedure for the quashing of appeals, courts do quash appeals of their own motion for defects obvious from the record: *Edmonson v. Bloomshire*, 74 U. S. 306; *Tinkoff v. West Publishing Co.*, 152 F. 2d 754, cert. denied, 67 S. Ct. 75.

A Pennsylvania case in point is *Jones v. Marion Coal Company*, 227 Pa. 509, where the Pennsylvania Supreme Court of its own motion quashed an appeal taken 17 days after the time fixed by statute. No motion to quash was made, nor does the point appear anywhere in the paper books.

In *Commonwealth v. Greenfield*, 103 Pa. Superior Ct. 489, the Pennsylvania bar was fully apprised that appeals

are perfected too late at the peril of an appellant. Said the court at page 496: "An examination of the original record discloses that the appeal was not perfected within the *time limited* by statute. As the Commonwealth has not moved to quash we have considered the merits, but our action in so doing is not to be considered as establishing a precedent."

Petitioner gained a full hearing as to the reasonableness of time consumed in perfecting his appeal by setting out his explanations in detail for the Pennsylvania Supreme Court in his Petition for Rehearing of Appeal. After consideration of the allegations of the said petition, the Pennsylvania Supreme Court took the following action: "Petition Dismissed Per Curiam" (R. 461a, 462a). If petitioner's cause presented any persuasive equities the court had ample opportunity to take corrective action at that time.

The petition for Rehearing of the appeal operated to suspend the finality of the State Court's judgment pending the court's further determination whether the judgment should be modified. Indeed, if the petition for rehearing had not had the effect of reopening the whole case to permit the State Supreme Court to consider the allegations petitioner made therein, his present petition for certiorari before your honorable court would be quashed as being too late, because it was filed over three months after the Pennsylvania Supreme Court's judgment of May 7, 1947: *Department of Banking, State of Nebraska v. Pink*, 317 U. S. 264.

The Commonwealth of Pennsylvania "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 105. This is a salutary rule based on the necessity for the prompt, efficient and just dispatch of public

business. Petitioner has made no such showing as should impel your honorable court to prescribe to the Pennsylvania Supreme Court how it should interpret an Act of the Pennsylvania Assembly governing the time for taking appeals.

3. Conclusion.

It is respectfully submitted that for the reasons above set forth, the Petition of William S. Fenerty for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, should be denied by your Honorable Court.

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*Attorneys for the Committee of
Censors of the Philadelphia
Bar Association,*

Respondents.

September 11, 1947.

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OCTOBER TERM, 1947

No. 298

In the Matter of
William S. Fenerty

REPLY BRIEF

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH
OF PENNSYLVANIA.

JOHN BOYLE,
WILLIAM S. FENERTY,
Attorneys.

CITATIONS

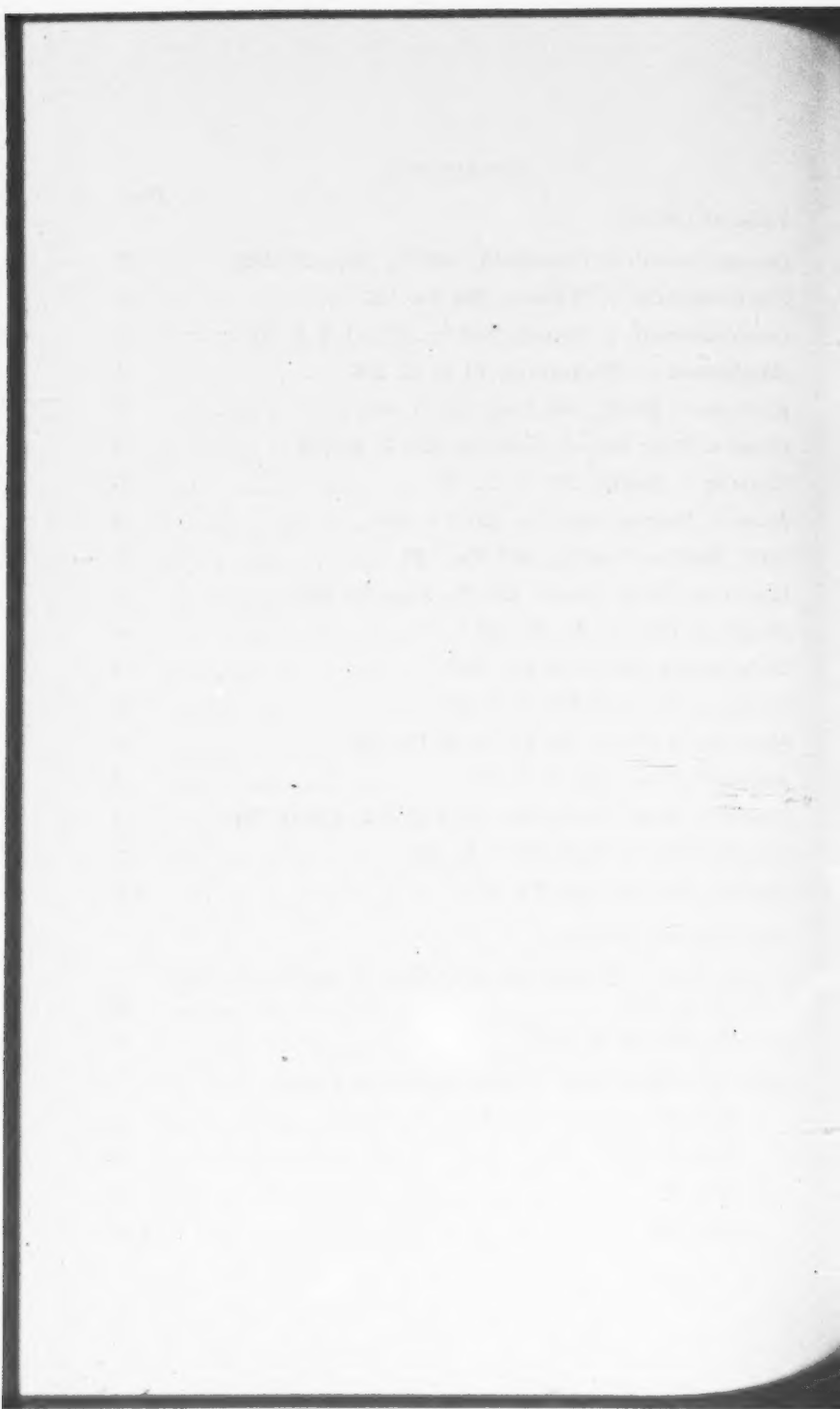
Page

Table of Cases:

Commonwealth v. Greenfield, 103 Pa. Sup. Ct. 489.....	2
Commonwealth v. O'Keefe, 298 Pa. 169	6
Commonwealth v. Stauch, 256 Pa. 620, 101 A. 72	3
Edmondson v. Bloomshire, 74 U. S. 306	1
Emmons v. Smitt, 149 Fed. (2nd) 869	5
Grace v. State Bar of Alabama, 320 U. S. 708	7
Hurwitz v. North, 271 U. S. 40	5
Jones v. Marion Coal Co., 227 Pa. 509	1
Koch Election Contest, 351 Pa. 544	3
Layton v. Comp. Board, 156 Pa. Sup. Ct. 225	3
Menges v. Dentler, 33 Pa. 495	6
Moyerman's Case, 312 Pa. 555	4
Selling v. Radford, 243 U. S. 46	7
Steinman & Hensel, Ex parte, 95 Pa. 220	4
Summer's Case, 325 U. S. 561	6
Tinkoff v. West Publishing Co., 152 Fed. (2nd) 754	1
United States v. Vigil, 77 U. S. 423	2
Ziegler's Petition, 207 Pa. 131	2-3

Miscellaneous citations:

Constitution of Pennsylvania, Article I, sec. 9, PS Title	
Const. p. 124	6
C. J. S., Vol. 16, p. 1142	6
Rules of Philadelphia Court of Common Pleas—	
Rule 68	6
Rule 69	6
Rule 82	2
Rule 215	4, 6



ARGUMENT

The Bar Committee raises certain issues not fully considered in Petitioner's principal brief, which necessitates filing this Reply Brief.

QUESTION II

In the brief of the Petitioner, under Question II, the contention is made that it was a violation of a substantive Federal Right for the court, sua sponte, to quash the appeal without a motion by appellee upon an alleged jurisdictional objection not apparent of record. The Bar Committee, in its brief, avers that the alleged defect was apparent of record. This presents the issue.

The evidence is that the original writ was returnable to the 4th Monday of November, 1946 (R. 401). The context of the Statute makes no restriction as to the time within which the writ must be perfected in the lower court (Appendix A, Petitioner's Brief). The docket entries show that the Certiorari was entered in the lower court on October 22, 1946, under a Nunc Pro Tunc. With consent of the court it was agreed by both parties that the appeal was perfected as of August 6, 1946 (R. 399). To all appearances the petitioner had complied with the Statute and the alleged defect is not apparent of record.

Edmondson v. Bloomshire, 74 U. S. 306, cited by the Bar Committee, is not applicable to the instant case because the writ in the *Edmondson* case was not perfected before the expiration of the term next succeeding the allowance of the appeal.

Tinkoff v. West Publishing Co., 152 Fed. (2nd) 754, and *Jones v. Marion Coal Co.*, 227 Pa. 509, 510, cited by the Bar Committee, are likewise inapplicable to the instant case because, in both of these proceedings, the court had

before it an appeal which *had not been taken* within the prescribed statutory period.

Commonwealth v. Greenfield, 103 Pa. Sup. Ct. 489, cited by the Bar Committee, was an indictment for arson. The docket entries disclose that a verdict was entered on April 28, 1931. Court of Common Pleas Rule #82 provides that a motion for a new trial must be made within four days. The motion was made on May 20, 1931, which was approximately 3 weeks. The motion was overruled and sentence imposed on June 23, 1931. The Certiorari was entered in the lower court on July 23, 1931. The Statute provides that appeals of this nature must be taken within 45 days after sentence (Appendix A, p. 2a, Petitioner's Brief). The context of the Act makes no provision as to when the appeal must be perfected. Nevertheless, the Superior Court states that the appeal was not perfected within the time limited by Statute.

It is submitted that the statement of the court is inaccurate. What the court appears to be trying to say is that the motion for a new trial in the lower court was not taken within the four days prescribed by the Court Rule #82. However, the lower court disposed of the motion upon its merits and the appellate court did not quash the appeal, which it said had not been perfected within the time limited by Statute.

The Bar Committee presents the novel argument that the petitioner received a full hearing upon the reasonableness of the time consumed in perfecting the appeal because the Supreme Court dismissed the petition without explanation. Since none of the averments of the petition are denied, it follows that the delay in perfecting the appeal must be attributed to the laxity of the court or some more sinister reason. Under these circumstances it has been held that the time for perfecting the appeal shall be extended: *United States v. Vigil*, 77 U. S. 423, 425, 426. This adjudication is in line with the Pennsylvania Cases: *Ziegler's*

Petition, 207 Pa. 131, 137; *Koch Election Contest*, 351 Pa. 544, 548; *Layton v. Comp. Board*, 156 Pa. Sup. Ct. 225, 227.

Therefore, it is submitted that the maladministration of the Act of Assembly and disregard of the Rules of Court has been established.

III

In the brief of the Petitioner, under Question III, the contention is made that it is a violation of a substantive Federal Right for three judges to enter a decree under Rule #215 of the Courts of C. P. of Philadelphia County when two of the judges heard only some witnesses; the third judge was absent and a hearing upon exceptions was denied.

The argument, presented in the brief of the Bar Committee, is that the State Supreme Court reviews disbarment proceedings *de novo*; that the petitioner had a fair opportunity to present the facts to that tribunal; and that, for these reasons, the petitioner was not deprived of equal protection and of procedural due process. The argument presented in these proceedings is inconsistent with that which was presented to the State Supreme Court because it was there urged that the credibility of the witnesses and the weight to be given their testimony was exclusively a question for the lower court.¹⁵

"An examination of the witnesses by the court means seeing and hearing them . . . not a mere reading of the testimony by a judge who neither saw or heard them.": *Commonwealth v. Stauch*, 256 Pa. 620, 101 A. 72. There is no reported case in which the State Supreme Court has permitted an attorney to bring his witnesses before it in order to establish the facts. This would be an exercise of

¹⁵ See Petitioner's Brief, Appendix F, Appellee's Counter-Statement Question 1.

original jurisdiction beyond the authority conferred upon the court.¹⁶

Commenting upon this issue, the State Supreme Court has said: "What is meant by reviewing *de novo* is not very intelligible unless it be from that which follows that the court is to hear any new testimony which may be offered by the *complainant*, but not by the court below or any other party, if there can be any others. On the whole it is a curious piece of legislative patchwork. How far the provision that this court shall hear new testimony and decide the case as if it was a new one consists with that article of the Constitution which prohibits the Supreme Court from the exercise of any original jurisdiction, except in a few specified cases, is a question which does not arise as the controversy here is presented fully on the record, and we are not asked to look after it.": *Ex parte Steinman & Hensey*, 95 Pa. 220, 236.

The Bar Committee has drawn an incorrect conclusion from *Moyerman's Case*, 312 Pa. 555. The record of that proceeding in the lower court is: CP #4, June Term 1932, No. 2591. The docket entries disclose that on June 15, 1932, the committee presented a petition under Rule #215. The order of the court was entered on October 6, 1932; the Certiorari was issued by the Supreme Court on October 8, 1932. It was argued April 19, 1933; and the Opinion of the Supreme Court was entered on June 30, 1933. The dates are very material.

It is noted in the record that the hearings were held before Finletter and Heligman, JJ. The order of the Court

¹⁶ Art. 5, sect. 3, P. S. Title Constitution, page 36, provides that the Supreme Court shall have original jurisdiction "in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State but shall not exercise any other original jurisdiction."

reads: "Judge Brown, being otherwise engaged, took no part in the hearing or disposition of this rule." In the instant case, the court "made it appear" that McDevitt was present although he, like Brown, J., was otherwise engaged.

In the historical note to Rule #215 (Petitioner's Brief, Appendix H, pages 12a and 13a) it is explained that when the Rule was adopted by the court in 1926 no provision was then made as to how many judges shall be present at the hearing of a disbarment proceeding. The Rule was amended on Jan. 11, 1933 (Legal Intelligencer, Jan. 20, 1933). It was then provided by this amendment that a judge of each of the five Common Pleas Courts shall sit at the hearing. Under a second amendment of March 5, 1942, the number of judges required was reduced to three.

Since the Moyerman Case had been heard on June 15, 1932, which was approximately six months prior to the amendment of Jan. 11, 1933, the case is not applicable to the instant case.

In *Hurwitz v. North*, 271 U. S. 40, 42, cited by the Bar Committee, the Statute, which was before the court, provided that "testimony may be taken by deposition to be used in evidence at the trial." The Missouri Court construed the Statute to mean that testimony could be taken on deposition but the party was not entitled to a subpoena to compel the attendance of the witnesses.

Rule #215, which applies to the instant case, recites that "The respondent may summon such witnesses as he desires. . . . After full hearing by the court, at which such evidence as either party desires to present shall be heard. . . ." (Appendix H, p. 9a, Petitioner's Brief). Therefore, under Rule #215 the petitioner in the instant case was entitled to compel the attendance of witnesses by subpoena, and the Hurwitz case has no application to the question involved.

Emmons v. Smitt, 149 Fed. (2nd) 869, 872, cited by the Bar Committee, holds that under the Michigan Law an attorney does not have a property right in his office; that

the Federal District Court was required in that particular proceeding to enforce the Michigan Law; and, by reason of this fact, the Federal District Court did not have jurisdiction in the premises.

To the contrary, the Pennsylvania Courts hold that an attorney has a property right in his office; and that he cannot be deprived of this property unless by a judgment of his peers and the *law of the land*: *Ex parte Steinman & Hensel*, supra.¹⁷ The term *law of the land* is synonymous with *due process of law*: CJS vol. 16, p. 1142; *Menges v. Dentler*, 33 Pa. 495; *Com. v. O'Keefe*, 298 Pa. 169, 172, 173.

Therefore, the Emmons case is not applicable to a proceeding which originates under the Pennsylvania Law.

In the *Summer's Case*, 325 U. S. 561, cited by the Bar Committee, the Illinois Supreme Court denied an application for permission to practice upon the ground that the applicant would be unable, in good faith, to take the required oath to support the Constitution of the State because of conscientious scruples resulting in unwillingness to serve in the State Militia in time of war.

Various relevant factors distinguish the instant case from the Summer's case. The Bar Committee, in its brief, does not deny that the record in the instant case was altered so as to let it appear that the proceedings were conducted according to Rule #215 of the C. P. Courts of Philadelphia County; that the complainant and his attorney were permitted, by the committee and the court, to meddle with the witnesses; that the court inserted into the record a wholly fictitious statement of facts with reference to the sale of collateral pledged by the complainant with the petitioner as security for payment of services rendered; and that the lower court denied the petitioner a hearing upon exceptions

¹⁷ Art. 1, sect. 9, of the Constitution of Pennsylvania, *inter alia*, provides that the accused cannot "be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.": PS Title Const. p. 124.

under Court Rules #68 and 69 (Appendix M, Petitioner's Brief).

None of these factors were present in the Summer's case. The same thing may be said with reference to *Selling v. Radford*, 243 U. S. 46, 50; and *Grace v. State Bar of Alabama*, 320 U. S. 708, both of which cases are cited in the brief of the Bar Committee.

CONCLUSION

The brief, submitted by the Bar Committee, presents no obstacle to the issuance of a Writ of Certiorari in these proceedings.

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